CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, and Notices

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 29 **AUGUST 30, 1995** **NO. 35**

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 95–63)

REVOCATION OF CUSTOMS BROKER LICENSES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Broker license revocations.

SUMMARY: Notice is hereby given that on July 5, 1995, the Secretary of the Treasury, pursuant to Section 641, Tariff Act of 1930, as amended, (19 U.S.C. 1641), and Part 111.74 of the Customs Regulations, as amended (19 CFR 111.74), ordered the revocation of the following Customs broker licenses due to the failure of the broker to file the status report as required by 19 CFR 111.30(d). The list of affected brokers is as follows:

District	*Customs broker*	*Licence No.*
Baltimore	Norbert Anderson	7683
	Joseph Cataggio	4228
	Sharon Miles	9535
Charleston	James Fernandez	6070
	Jack O. Garren	5867
	Janet Pate	11912
Charlotte	Robert Auslander	10167
	Andrew Davies	12753
	Frederick Spike	6969
	James P. Wilson	2103
Chicago	Kevin Calkin	12210
	Margaret Cassidy	9077
	George Divenere	12660
	Paul Grenchik	6459
	Mark Hogan	10311
	Claudia Johnson	11585
	William Panzarella	12169
	Edward Pluemer	7652
Cleveland	William Ajenian	4244
	Frank Maskiel	9051
	Heidi Rollins	12239
	William E. Smith	11298

District	*Customs broker*	*Licence No.*
Dallas	Sandra Dethrage	11622
	Jacque M. Goar	6686
	Corbin E. Jeffries, Jr.	6593
	Charles L. Narmore	7691
Detroit	Mathew Adair	11820
	Darlene Habarth	11624
	Michael Irvin	9963
	William McAffe	3371
	Michael Mclean	4791
	Scott Stapleton	12800
	John Tebbe	5008
	Dawn Wilson	12103
Duluth	Milton Eng	6505
Houston	George Anki	3708
	James Casler	7279
	Suzanne Schielack	6149
Norfolk	Karen L. Blanchard	10872
	Martin E. Day	3774
	Ronald A. Desconteaux	2948
	James M. Dyer	10314
	James G. Edmonson	12531
	Helen Seldon	6202
	Kenneth G. Swanson	9450
Philadelphia	Jona M. Barnhill	4241
	Douglas Scott Beck	10959
	William E. Booth	13110
	Matthew Garland	6444
	James J. Plunkett	7573
Savannah	Jonia Michelle Bradley	12747
	Glen Grant	12627
	Norman Krueger	10393
	Manuel McGinn	6281
	Robert Powers	13319
Washington DC	Jeffery Doyon	12480

Dated: August 16, 1995.

PHILIP METZGER,
Director,
Trade Compliance.

[Published in the Federal Register, August 23, 1995 (60 FR 43838)]

(T.D. 95–64)

RETRACTION OF REVOCATION NOTICE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: The following Customs broker license number was erroneously included in a list of revoked Customs brokers licenses in the June 28, 1995, CUSTOMS BULLETIN.

Customs broker	*License No.*
Darrell J. Sekin Co., Inc.	5249

License 5249, issued in the Houston-Galveston District, remains a valid license.

Dated: August 16, 1995.

PHILIP METZGER,
Director,
Trade Compliance.

[Published in the Federal Register, August 23, 1995 (60 FR 43839)]

(T.D. 95–65)

CANCELLATION OF CUSTOMS BROKER LICENSES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Cancellation of license.

SUMMARY: Notice is hereby given that, pursuant to 19 CFR 111.51(a), the following Customs broker license is cancelled due to the death of the broker. The license was issued in the New York Region.

Customs broker	*License No.*
John J. Klingman	4255

Dated: August 16, 1995.

PHILIP METZGER,
Director,
Trade Compliance.

[Published in the Federal Register, August 23, 1995 (60 FR 43839)]

U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, August 14, 1995.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

MODIFICATION OF CUSTOMS RULING LETTER RELATING TO ELIGIBILITY OF PRINTED PAPER AND PLASTIC BAGS FOR DUTY-FREE TREATMENT UNDER THE GSP

ACTION: Notice of modification of ruling letter concerning the eligibility of printed paper and plastic bags for duty-free treatment under the Generalized System of Preferences (GSP).

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended try section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs is modifying a ruling pertaining to the eligibility of printed paper and plastic bags for duty-free treatment under the GSP. Notice of the proposed modification was published July 13, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 28.

EFFECTIVE DATE: This decision is effective for merchandise entered, or withdrawn from warehouse for consumption on or after October 30, 1995.

FOR FURTHER INFORMATION CONTACT: Monika Rice, Special Classification and Marking Branch, Office of Regulations and Rulings, (202–482–6980).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On July 13, 1994, Customs published a notice in the CUSTOMS BULLETIN, Volume 28, Number 28, proposing to modify Headquarters Ruling Letter (HRL) 557034/557072, issued July 14, 1993, concerning the eligibility of printed paper and plastic bags for duty-free treatment under the GSP. HRL 557034/557072 holds in part that the printing of paper or plastic film with colors, designs, and/or customer graphics does not substantially transform the paper or film into a new and different article of commerce. The notice included proposed HRL 557931, prepared in response to an application for further review of a protest, which also pertained to the eligibility of printed paper and plastic bags for duty-free treatment under the GSP.

NEW POSITION

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs is modifying HRL 557034/557072 since the ruling holds that the printing of paper or plastic film with colors, designs, and/or customer graphics does not substantially transform the paper or film into a new and different article of commerce. We have reconsidered this position.

Customs still maintains that certain printing operations which do not change the use of an article will not result in a substantial transformation of that article. *See* HRL 731779 dated December 9, 1988, where Customs determined that the printing of advertising information on pens did not constitute a substantial transformation for country of origin marking purposes because after the printing the pens were still properly referred to as pens, and their use as writing implements remained the same. *See also* HRL 734152 dated August 26, 1991, where U.S.-origin balloons printed with a design or letters in Canada were not substantially transformed for country of origin marking purposes. On the other hand, Customs has recognized that some printing operations result in a substantial change in use of an article. For example, in HRL 557408 dated January 14, 1994, it was determined that a substantial transformation occurred for purposes of the GSP when paper was printed in Mexico with bingo game faces. Upon exportation from the U.S., the paper was a raw material of a generic nature with varied uses, but was dedicated to use as bingo game faces after the printing was complete.

Unlike the printing of pens or balloons as discussed above, the paper and plastic rollstock in HRL 557034/557072 are not in their final form, but rather are raw materials as in HRL 557408 when they are printed with a particular customer name, design, or color. Such printing operations change the essential character and use of the paper and plastic by converting them from a multifunctional article into one suited for spe-

cific uses. Accordingly, Customs finds that these printing operations are significant enough to result in a substantial transformation of the paper and plastic rollstock. However, we note that rollstock which is printed with labeling information, such as a UPC label, company logo, or country of origin marking on the bottom of a bag into which the rollstock is made will not result in a substantial transformation of the rollstock. *See Superior Wire v. United States,* 669 F. Supp. 472, 480 (CIT 1987), *aff'd* 867 F.2d 1409 (Fed. Cir. 1989), where the Court of International Trade did not find a substantial transformation in part because "no change from a product suitable for many uses to one with more limited uses took place."

Accordingly, it is Customs position that the printing of rollstock and plastic with colors, designs, and/or customer graphics, changes the character of the paper or plastic film from a raw material with numerous uses to a material with limited uses to a degree significant enough to constitute a substantial transformation. Consequently, HRL 557034/557072 is hereby modified in accordance with the position expressed in this General Notice.

Dated: August 11, 1995.

SANDRA L. GETHERS,
(for John Durant, Director,
Commercial Rulings Division.)

PROPOSED REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF FUSION GLASS FOR ELECTROLUMINESCENT FLAT PANEL DISPLAYS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling relating to the tariff classification of flat glass for display panels. These are cut glass shapes to which a conductor layer and a light emitting layer are applied. Customs invites comments on the correctness of the proposed revocation.

DATE: Comments must be received on or before September 29, 1995.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings,

Attention: Commercial Rulings Division, 1301 Constitution Avenue, N.W. (Franklin Court), Washington, DC 20229. Submitted comments may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th. Street, N.W., Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Metals and Machinery Classification Branch (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling relating to the tariff classification of flat glass shapes for display panels. Customs invites comments on the correctness of the proposed revocation.

In *HQ* 957909, dated May 19, 1995, fusion glass for electroluminescent flat panel displays was held to be classifiable as other glass of heading 7003, 7004 or 7005, bent, edge-worked, engraved, drilled, enameled or otherwise worked, but not framed or fitted with other materials, in subheading 7006.00.40, Harmonized Tariff Schedule of the United States (HTSUS). This ruling was based on the belief that certain edge working and application of conductor and light emitting layers were not sufficient to remove the glass shapes from heading 7006. *HQ* 957909 is set forth as "Attachment A" to this document.

It is now Customs position that these flat glass shapes have been processed into parts of electroluminescent flat panel displays. Similar to liquid crystal display panels but utilizing different technology to perform their function, electroluminescent flat panel displays or display panels are designed to display data or information. These articles are provided for in HTS heading 8543.

Customs intends to revoke *HQ* 957909 to reflect the proper classification of the flat glass shapes, processed as described, under subheading 8543.90.75, HTSUS, as other parts of electrical machines and apparatus, having individual functions, not specified or included elsewhere in chapter 85. Before taking this action, we will give consideration to any written comments timely received. Proposed *HQ* 958276 revoking *HQ* 957909 is set forth as "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: August 10 1995.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, May 19, 1995.

CLA–2 R:C:M 957909 KCC
Category: Classification
Tariff No. 7006.00.40

MS. SHIRLEY JUSTICE
CIRCLE INTERNATIONAL, INC.
9620 N.E. Colfax Street
Portland, OR 97220

Re: Fusion glass for electroluminescent flat panel displays; part; Additional U.S. Rule of Interpretation 1(c); 7004; drawn glass; Note 2, chapter 70; EN 70.04; EN 70.06; cutting to shape; absorbent or reflecting layer; edge working; other glass of heading 7004, bent, edgeworked, engraved, drilled, enameled or otherwise worked, but not framed or fitted with other materials.

DEAR MS. JUSTICE:

This is in response to your letter dated January 20, 1995, to the Regional Commissioner of Customs, New York, on behalf of Planar Systems, concerning the tariff classification of fusion glass for electroluminescent flat panel displays under the Harmonized Tariff Schedule of the United States (HTSUS). A sample was submitted for our examination. Additional information obtained via a telephone conversation with a member of my staff and contained in a letter dated March 27, 1995, was considered in rendering this decision.

Facts:

The article at issue is various sized fusion glass designed and used for electroluminescent flat panel displays. The fusion glass is drawn glass which is cut to shape. You state that the edge work is performed to remove the sharp edges left from the cut which is done only to protect the handler of the glass from dangerous sharp edges. Each piece win be 1.1 mm in thickness. The glass is then layered with Indium-Tin-Oxide (ITO). The ITO layer is a conductor that makes up the matrix of lines that carry current to each pixel in the electroluminescent flat panel display. The ITO layer is patterned using photolithography methods, similar to those used to make semiconductor chips and printed circuit boards, which results in a pattern of vertical lines on the display. Next, phosphors, which are the light emitting layers of the electroluminescent flat panel display, *i.e.* Zinc-Sulfide, are applied. Additionally, you state that the fusion glass is not suited for liquid crystal displays. You contend that the fusion glass is classifiable under subheading 8473.30.50, HTSUS, which provides for "Parts and accessories (other than covers, carrying cases and the like) suitable for use solely or principally with machines of headings 8469 to 8472. * * * Parts and accessories of the machines of heading 8471. * * * Not incorporating a cathode ray tube * * * Other * * * Other."

Issue:

What is the tariff classification of the fusion glass for electroluminescent flat panel displays under the HTSUS?

Law and Analysis:

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1, HTSUS, states, in part, that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *."

Additional U.S. Rule of Interpretation 1(c) states that

> [A] provision for parts of an article covers products solely or principally used as a part of such articles but a provision for "parts" or "parts and accessories" shall not prevail over a specific provision for such part or accessory.

Therefore, if the fusion glass is specifically provided for in a tariff provision within the HTSUS, it cannot be classified under a tariff provision for "parts" or "parts and accesso-

ries." Since the article at issue is glass, we must examine chapter 70, HTSUS, for applicable tariff provisions. The following must be considered:

7004 Drawn glass and blown glass, in sheets, whether or not having an absorbent or reflecting layer, but not otherwise worked * * *.

7006 Glass of heading 7003, 7004 or 7005, bent, edgeworked, engraved, drilled, enameled or otherwise worked, but not framed or fitted with other materials.

Note 2, chapter 70, HTSUS, states that for purposes of heading 7004, HTSUS:

(a) Glass is not regarded as *"worked"* by reason of any process it has under gone before annealing;

(b) Cutting to shape does not affect the classification of glass in sheets;

(c) The expression *"absorbent or reflecting layer"* means a microscopically thin coating of metal or of a chemical compound (for example, metal oxide) which absorbs, for example infrared light or improves the reflecting qualities of the glass while still allowing it to retain a degree of transparency or translucency.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) may be consulted. The ENs, although not dispositive nor legally binding, provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. *See,* T.D. 89–90, 54 Fed. Reg. 35127, 35128 (August 23, 1989). EN 70.04 (pg. 929), states, in pertinent part,:

This heading is restricted to drawn glass and blown glass which **must** be unworked and in sheets (whether or not cut to shape) * * *

The glass of this heading may be of various thicknesses but, in general, is less thick than cast glass of **heading 70.03.** It may be coloured or opacified in the mass, or flashed with glass of another colour during manufacture or may be coated with an absorbent or reflecting layer.

Drawn glass and blown glass are frequently used in the form in which they are originally produced, without any further working. In addition to their main use as glass for windows, doors, display cases, greenhouses, clocks, pictures, etc., these types of glass are also used as parts of articles of furniture, for photographic plates, plain spectacle glass, etc (emphasis in original).

EN 70.06 (pgs. 930–931), states that:

This heading covers glass of the types referred to in headings 70.03 to 70.05 which has been subjected to one or more of the process mentioned below * * *

(B) **Glass with worked edges** (ground, polished, rounded, notched, chamfered, beveled, profiled, etc.) thus acquiring the character of articles such as slabs for tabletops, for balances or other weighing machinery, for observation slits and the like, for signs of various kinds, fingerplates, glass for photograph frames, etc., window panes, glass frontes for furniture, etc. * * * (emphasis in original).

The fusion glass is cut to shape. Pursuant to Note 2(b), chapter 70, HTSUS, cutting to shape does not affect the classification of drawn glass in sheet form. Therefore, although cut to shape, the fusion glass is classifiable under heading 7004, HTSUS.

Heading 7004, HTSUS, glass may have an "absorbent or reflecting layer. " However, we are of the opinion that the Indium-Tin-Oxide (ITO) applied to the fusion glass is not the type of "absorbent or reflecting layers" contemplated by Note 2(c), chapter 70, HTSUS. The ITO is not a layer or coating; it is applied in a pattern of vertical lines with a photolithography process similar to that used in the semiconductor industry. In our opinion this is a working operation, not the simple type of layering operation contemplated by Note 2(c), chapter 70, HTSUS, and heading 7004, HTSUS.

Moreover, the fusion glass is edgeworked. You state that the edge working is performed to remove the sharp edges left from the cut and that this is done only to protect the handler of the glass from dangerous sharp edges. A visual examination of the submitted sample, indicates that the edge working entails removal of the four sharp corners and beveling the both the top and bottom four sides. We are of the opinion that this edge working removes the fusion glass from classification under heading 7004, HTSUS. Pursuant to EN 70.06, this type of "worked edges" is the type of "edgeworked" contemplated by heading 7006, HTSUS. Therefore, we are of the opinion that the fusion glass is classifiable under subheading 7006.00.40, HTSUS, which provides for:

Glass of heading 7003, 7004 or 7005, bent, edgeworked, engraved, drilled, enameled or otherwise worked, but not framed or fitted with other materials * * * Other * * * Other.

Because the fusion glass is specifically provided for under subheading 7006.00.40, HTSUS, as other glass of heading 7004, bent, edgeworked, engraved, drilled, enameled or otherwise worked, but not framed or fitted with other materials, it is not classifiable as a "part", pursuant to Additional U.S. Rule of Interpretation 1(c), HTSUS.

Holding:

The fusion glass for electroluminescent flat panel displays is classified under subheading 7006.00.40, HTSUS, as other glass of heading 7004, bent, edgeworked, engraved, drilled, enameled or otherwise worked, but not framed or fitted with other materials. The corresponding duty rate for articles classified under this tariff provision is 4.9 percent *ad valorem*.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA–2 R:C:M 958276 JAS
Category: Classification
Tariff No. 8543.90.75

MS. SHIRLEY JUSTICE
CIRCLE INTERNATIONAL, INC.
9620 N.E. Colfax Street
Portland, OR 97220

Re: Fusion glass for electroluminescent flat panel displays; cut glass shapes with conductor and light emitting layers; other glass of heading 7003, 7004 or 7005, bent, edgeworked, engraved, drilled, enameled or otherwise worked, but not framed or fitted with other materials; parts of electroluminescent flat panel displays, section XVI, Note 2; *HQ* 955700, *HQ* 957793, *HQ* 957909 revoked.

DEAR MS. JUSTICE:

In letters to the Regional Commissioner of Customs, New York, dated January 20 and March 27, 1995, on behalf of your client, Planar Systems, you inquired as to the tariff classification of fusion glass from Japan for electroluminescent flat panel displays.

We replied to your request in *HQ* 957909, dated May 19, 1995, and confirmed that the fusion glass was classifiable in subheading 7006.00.40, Harmonized Tariff Schedule of the United States (HTSUS), as other glass of heading 7003, 7004 or 7005, bent, edge-worked, engraved, drilled, enameled or otherwise worked, but not framed or fitted with other materials. This ruling revokes *HQ* 957909 and represents Customs current position on the classification of this merchandise.

Facts:

As described in *HQ* 957909, the merchandise is fusion glass designed and used for electroluminescent (EL) flat panel displays. EL flat panel displays are used in industrial controllers, blood gas monitors and commercial copiers, among other uses. This glass is cut to various sizes and shapes, worked to remove sharp edges, and the 4 corners slightly bevelled. A sample submitted with the ruling request measured 9½ inches × 7¼ inches, 1.1 mm thick. The glass is then layered with Indium Tin Oxide (ITO), a conductor that makes up the matrix of lines that carry current to each pixel in the electroluminescent flat panel display, and phospors are applied. These are light emitting layers of zinc sulfide that also serve as conductors.

In the January 20, 1995, ruling request, you suggested that subheading 8473.30.50, HTSUS, a provision for other parts and accessories of automatic data processing machines

might apply, as these glass shapes, processed as described, are used with ADP machines and have no other uses. *HQ* 957909 omitted any discussion of this provision because subheading 7006.00.40 was deemed to be specific, and to supersede a parts provision.

The provisions under consideration are as follows:

7006	Glass of heading 7003, 7004 or 7005, bent, edge-worked, engraved, drilled, enameled or otherwise worked, but not framed or fitted with other materials:
	Other:
7006.00.40	Other * * *4.9 percent
* * * * * * *	
8543	Electrical machines and apparatus, having individual functions, not specified or included elsewhere in [chapter 85]; parts thereof:
8543.90	Parts:
	Other:
8543.90.75	Other * * * 3.6 percent

Issue:

Whether cut-to-size fusion glass for EL flat panel displays is provided for as parts, in heading 8543.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

Customs has consistently held that goods that are identifiable as parts of machine or apparatus of Chapters 84 or 85 are in all cases to be classifiable in accordance with Section XVI, Note 2, HTSUS. *HQ* 955700, dated December 8, 1994, and related cases. Thus, under Note 2(a), parts which are goods included in any of the headings of chapters 84 or 85 are to be classifiable in their respective headings. Under Note 2(b), other parts suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading, are to be classified with the machines of that kind.

In *HQ* 957793, dated April 19, 1995, we held that EL display panels for blood pressure monitors were distinguishable from liquid crystal display panels because they utilize different technology, and were classifiable in subheading 8543.80.98, HTSUS, a provision for electrical machines and apparatus, having individual functions, not specified or included elsewhere in [chapter 85].

Evidence in this case indicates that the fusion glass shapes, cut to shape as described, and with ITO layers and phosphors or light emitting layers to serve as conductors, are integral, constituent and component parts necessary to the completion and proper functioning of EL display panels. They qualify as parts for tariff purposes. Their specific shape and manner of processing is an indication they are principally, if not solely used with display panels of heading 8543.

Holding:

Under the authority of GRI 1, the fusion glass shapes are provided for in heading 8543. They are classifiable in subheading 8543.90.75, HTSUS.

HQ 957909, dated May 19, 1995, is revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED MODIFICATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF UNITS FOR AIR CONDITIONING MACHINES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of a condenser unit and evaporator unit for an air conditioning machine. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before September 29, 1995.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue NW, (Franklin Court) Washington, DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, Nw, Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Larry Ordet, Metals and Machinery Classification Branch, (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of a condenser unit and evaporator unit for an air conditioning machine.

In Headquarters Ruling Letter (HQ) 957130, dated November 9, 1994, a condenser unit and evaporator unit for an air conditioning machine were classified, according to note 4 to section XVI ("functional units"), under subheading 8415.83.00. Harmonized Tariff Schedule of the United States (HTSUS), which provides for air conditioning machines, comprising a motor-driven fan and elements for changing the temperature and humidity, not incorporating refrigerating units. HQ 957130 is set forth in Attachment A to this document

Customs Headquarters is of the opinion that the units cannot be classified according to note 4 to section XVI, and are classifiable under subheading 8415.90.80, HTSUS, which provides for parts of air

conditioning machines. Therefore, Customs intends to modify HQ 957130 to reflect the proper classification of the units under this subheading. Proposed HQ 958018 modifying HQ 957130 is set forth in Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: August 9, 1995.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, November 9, 1994.

CLA–2 CO:R:C:M 957130 DWS
Category: Classification
Tariff No. 8414.30.80,
8415.82.00 and 8415.83.00

MR. WILLIAM H. STEERE
UNITED TECHNOLOGIES CARRIER
CARRIER PARKWAY
P.O. Box 4600
Syracuse, NY 13221

Re: Air conditioning units; evaporator; condenser; compressor; section XVI, Note 4; functional unit; GRI 2(a); NAFTA; general notes 12(b)(i) and (ii)(A), and 12(t)/84.33(A).

DEAR MR. STEERE:

This is in response to your letter of May 11, 1994, to the Area Director of Customs, New York Seaport, concerning the applicability of the North American Free Trade Agreement (NAFTA) and classification of air conditioning units under the Harmonized Tariff Schedule of the United States (HTSUS). Your letter has been referred to this office for a response. We regret the delay in responding to your request.

Facts:

The merchandise consists of air conditioning units, imported from Canada, designed for use in buses. Each unit is comprised of a condenser fan coil unit, an evaporator fan coil unit, connecting tubing, and a compressor.

You have asked that we consider the classification of the compressor imported alone, as well as the following component combinations: the evaporator and the condenser shipped together; and the evaporator, the condenser, and the compressor shipped together, with the compressor contained within a separate crate. You have also requested a NAFTA ruling on the latter component combination if the compressor is non-originating.

The subheadings under consideration are as follows:

8414.30.80: [c]ompressors of a kind used in refrigerating equipment (including air conditioning): [o]ther.

The general, column one rate of duty for goods classifiable under this provision is 3.4 percent *ad valorem*.

8415.82.00: [a]ir conditioning machines, comprising a motor-driven fan and elements for changing the temperature and humidity, including those machines in which the humidity cannot be separately regulated; parts thereof: [o]ther, except parts: [o]ther, incorporating a refrigerating unit.

The general, column one rate of duty for goods classifiable under this provision is 2.2 percent *ad valorem*.

8415.83.00: [a]ir conditioning machines, * * *: [o]ther, except parts: [n]ot incorporating a refrigerating unit.

The general, column one rate of duty for goods classifiable under this provision is 2.2 percent *ad valorem*.

Issues:

Whether the evaporator and condenser are classifiable under subheading 8415.83.00, HTSUS, as an air conditioning machine, not incorporating a refrigerating unit.

Whether the evaporator, condenser, and compressor are an unassembled air conditioning machine, classifiable under subheading 8415.82.00, HTSUS, as an air conditioning machine, incorporating a refrigerating unit.

Whether the compressor is classifiable under subheading 8414.30.80, HTSUS, as a compressor of a kind used in refrigerating equipment.

Whether the component combination with the compressor is eligible for preferential treatment under the NAFTA.

CLASSIFICATION

Law and Analysis:

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRI's), taken in order. GRI 1 provides that classification is determined according to the terms of the headings and any relative section or chapter notes.

We will first deal with the classification of the evaporator and condenser shipped together.

Section XVI, note 4, HTSUS, states that:

> [w]here a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function covered by one of the headings in chapter 84 or chapter 85, then the whole falls to be classified in the heading appropriate to that function.

Under section XVI, note 4, HTSUS, because the evaporator and condenser are individual components intended to contribute together to the function of air conditioning covered by heading 8415, HTSUS, they constitute a functional unit which is specifically classifiable under subheading 8415.83.00, HTSUS.

Similarly, with regard to the evaporator, condenser, and compressor, when assembled, under section XVI, note 4, HTSUS, they constitute a functional unit specifically classifiable under subheading 8415.82.00, HTSUS. However, because the compressor is shipped together with the other two components but in its own crate, we must determine whether the three components constitute an unassembled functional unit.

GRI 2(a) states that:

> [a]ny reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), entered unassembled or disassembled.

With the presence of the three components, this component combination imparts the essential character of an assembled air conditioning machine. Therefore, it is classifiable as a functional unit under subheading 8415.82.00, HTSUS.

With regard to the classification of the compressor, it is specifically classifiable under subheading 8414.30.80, HTSUS.

NAFTA ELIGIBILITY

To be eligible for tariff preferences under the NAFTA, goods must be "originating good", within the rules of origin in general note 12(b), HTSUS. General notes 12(b)(i) and (ii)(A), HTSUS, state:

> [f]or the purposes of this note, goods imported into the customs territory of the United States are eligible for the tariff treatment and quantitative limitations set forth in the tariff schedule as "*goods originating in the territory of a NAFTA party*" only if—
>
> (i) they are goods wholly obtained or produced entirely in the territory of Canada, Mexico and/or the United States; or

(ii) they have been transformed in the territory of Canada, Mexico and/or the United States so that—

(A) except as provided in subdivision (f) of this note, each of the non-originating materials used in the production of such goods undergoes a change in tariff classification described in subdivisions (r), (s) and (t) of this note or the rules set forth therein * * *

You state that the component combination will contain a non-originating compressor. Therefore, because the combination contains a compressor from a country other than Mexico, Canada, and/or the U.S., general note 12(b)(i), HTSUS, does not apply. Consequently, we must resort to general note 12(b)(ii)(A), HTSUS.

Because the component combination is specifically provided for under subheading 8415.82.00, HTSUS, a transformation is evident when a change in tariff classification occurs which is authorized by general note 12(t)/84.33(A), HTSUS, which states:

[a] change to subheadings 8415.81 through 8415.83 from any subheading outside that group, except from tariff item 8415.90.40 or from assemblies incorporating more than one of the following: compressor, condenser, evaporator, connecting tubing.

Therefore, the non-originating compressor must come fro. a subheading other than 8415.81 through 8415.33, HTSUS, or from subheading 8415.90.40, HTSUS. As previously stated, the compressor is classifiable under subheading 8414.30.80, HTSUS.

Consequently, a change in tariff classification does occur, and the component combination, containing the compressor, is eligible for preferential treatment under the NAFTA.

Holding:

The evaporator and condenser are classifiable under subheading 8415.83.00, HTSUS, as an air conditioning machine, not incorporating a refrigerating unit.

The evaporator, condenser, and compressor are an unassembled air conditioning machine, classifiable under subheading 8415.82.00, HTSUS, as an air conditioning machine, incorporating a refrigerating unit.

The compressor is classifiable under subheading 8414.30.80, HTSUS, as a compressor of a kind used in refrigerating equipment.

The component combination containing the compressor is eligible for preferential treatment under the NAFTA.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA–2 R:C:M 958018 LTO
Category: Classification
Tariff No. 8415.82.00 and 8415.90.80

MR. WILLIAM H. STEERE
UNITED TECHNOLOGIES CARRIER
CARRIER PARKWAY
P.O. Box 4800
Syracuse, NY 13221

Re: Vertical packaged air conditioning units; GRI 2(a); section XVI, note 2,4; unfinished; functional unit; HQ 087077; HQ 957130 *modified.*

DEAR MR. STEERE:

This is in response to your letter of April 19, 1995, to the Customs office in New York, requesting the classification of a Carrier 50 BR BZ vertical packaged air conditioning unit under the Harmonized Tariff Schedule of the United States (HTSUS). Your letter was referred to this office for a response.

Facts:

The vertical packaged air conditioning unit consists of an evaporator fan coil, connecting tubing and compressor. The unit connects to an outdoor air- or water-cooled condenser unit. The indoor unit comprises approximately 70–80 percent of the value of the complete, "split-system" air conditioner, but cannot function without the outdoor unit. The 5 to 15 ton units are used in office buildings, light industrial. restaurant or retail applications. Different control systems are offered.

Issue:

Whether the vertical packaged air conditioning unit, an indoor unit for a split-system air conditioner, is classifiable as a part of air-conditioning machines under subheading 8415.90.80, HTSUS.

Law and Analysis:

The General Rules of Interpretation (GRI's) to the HTSUS govern the classification of goods in the tariff schedule. GRI 1 states, in pertinent part, that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or Chapter notes * * *."

Note 4 to section XVI, HTSUS, concerns the classification of "functional units" under the tariff schedule. The note provides, in pertinent part, that "[w]here a machine (including a combination of machines) consists of individual components * * * intended to contribute together to a clearly defined function covered by one of the headings in chapter 84 or chapter 85, then the whole falls to be classified in the heading appropriate to that function."

Split-system air conditioners consist of two units that, when imported together, contribute together to a clearly defined function described by heading 8415, HTSUS, which provides for air-conditioning machines, comprising a motor-driven fan and elements for changing the temperature and humidity. Accordingly, split-system air conditioners, which incorporate refrigerating units, are classifiable under subheading 8415.82.00, HTSUS, while those that do not incorporate refrigerating units are classifiable under subheading 8415.83.00, HTSUS.

The vertical packaged air conditioning unit, when imported separately, is not described by the terms of heading 8415, HTSUS, as it, by itself, is not capable of "changing the temperature and humidity." Moreover, because complete split-system air conditioners are classifiable as "functional units," neither the indoor, vertical packaged air conditioning unit, nor the outdoor condenser unit, can be classified according to GRI 2(a) as an "unfinished" air-conditioning machine. *See* HQ 087077, dated March 27, 1991 (wherein we stated that there are no HTSUS legal notes or ENs that provide for "unfinished" functional units). Finally, as the vertical packaged air conditioning unit is not a "goods included" in any chapter 84 or 85 heading, it is classifiable as a part of an air-conditioning machine under subheading 8415.90.80, HTSUS. *See* Section XVI, note 2(a)(b), HTSUS.

In HQ 957130, issued to you on November 9, 1994, we considered the classification of air conditioners for buses, imported in various configurations. One of the configurations concerned the importation of self-contained evaporator and condenser units for these air conditioners. These units, which do not form complete air conditioners, were classified according to note 4 to section XVI, HTSUS, under subheading 8415.83.001 HTSUS. As stated above, because complete split-system air conditioners are classifiable as functional units," the evaporator and condenser unit. which do not form complete air conditioning machines, cannot be classified according to GRI 2(a) as an "unfinished" air-conditioning machine. Accordingly, both are classifiable, as parts, under subheading 8415.90.80, HTSUS.

Holding:

The vertical packaged air conditioning unit is classifiable under subheading 8415.90.80, HTSUS, which provides for pans of air-conditioning machines. The corresponding rate of duty for articles of this subheading is 2% *ad valorem*.

Effect on Other Rulings:

HQ 957130, dated November 9, 1994, is modified.

JOHN DURANT,
Director,
Commercial Rulings Division.

TARIFF CLASSIFICATION OF SLEEPWEAR SEPARATES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed change of inconsistent tariff classification rulings of sleepwear separates.

SUMMARY: This notice advises the public that Customs proposes to modify inconsistent rulings on garments known as pajama or sleepwear separates which do not conform with Customs position on the proper classification of such garments. Customs Headquarters has issued rulings that women's woven cotton pajama or sleepwear separates, when imported without a matching component (thus precluding classification as pajamas), are classified as similar articles and remain within heading 6208 of the Harmonized Tariff Schedule of the United States (HTSUS). Heading 6208, HTSUS, provides for women's or girls' singlets and other undershirts, slips, petticoats, briefs, panties, nightdresses, pajamas, negligees, bathrobes, dressing gowns and similar articles. It has come to Customs attention that prior to issuance of these rulings a limited number of rulings were issued on similar garments referred to as pajama bottoms, sleep bottoms or sleep shorts. In these earlier rulings, the garments ruled upon were classified in the provision for women's or girls' pajamas. This was an error. Due to the likelihood that Customs Headquarters may not be aware of all rulings issued on such garments, notice is hereby being given via the Federal Register of our intent to modify these inconsistent rulings to conform with our view with respect to classification of the garments, not as pajamas, but as similar articles. Before modification of these rulings, consideration will be given to any written comments timely submitted in response to publication of this notice.

DATE: Comments must be received on or before September 18, 1995.

ADDRESS: Written comments are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, NW., (Franklin Court), Washington, DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Cynthia Reese, Textile Classification Branch (202–482–7050).

SUPPLEMENTARY INFORMATION:

BACKGROUND

This notice advises the public that Customs proposes to modify inconsistent rulings on garments known as pajama or sleepwear separates which do not conform with Customs current views on the proper classification of such garments. Customs Headquarters issued a ruling

on the classification of certain women's sleepwear separates, HRL 956202 of September 29, 1994. In that ruling, Customs ruled that women's woven cotton pajama or sleepwear separates, when imported without a matching component (thus precluding classification as pajamas), are classified as similar articles and remain within heading 6208 of the Harmonized Tariff Schedule of the United States (HTSUS). Heading 6208, HTSUS, provides for women's or girls' singlets and other undershirts, slips, petticoats, briefs, panties, nightdresses, pajamas, negligees, bathrobes, dressing gowns and similar articles. As similar articles, the pajama/sleepwear separates were classified in subheading 6208.91.3010, Harmonized Tariff Schedule of the United States Annotated (HTSUSA).

Rulings issued since HRL 956202 have followed the classification arguments stated therein. It has come to Customs attention that prior to issuance of this ruling a limited number of rulings were issued on similar garments referred to as pajama bottoms, sleep bottoms or sleep shorts. In these earlier rulings, the garments ruled upon were classified in the provision for women's or girls' pajamas. This was an error. Due to the likelihood that Customs Headquarters may not be aware of all rulings issued on such garments, notice is hereby being given via the Federal Register of our intent to modify these rulings to reflect classification of the garments, not as pajamas, but as similar articles. Before the change becomes effective, consideration will be given to any written comments timely submitted in response to publication of this notice.

In Headquarters Ruling Letter 088192 issued on February 20, 1991, and New York Ruling Letter 862500 of April 29, 1991, a pair of ladies' boxer-style shorts, style 53035, were classified in subheading 6208.22.0000, HTSUSA, which provides for women's or girls' nightdresses and pajamas of man-made fibers. Style 53035 was constructed of a woven polyester satiny fabric. In NYRL 885168 of May 17, 1993, Customs classified a pair of boxer-type shorts of 100 percent woven polyester charmeuse as sleepwear in subheading 6208.22.0000, HTSUSA. In DD 889242 of August 27, 1993, Customs classified a women's woven cotton pajama pant in subheading 6208.21.0020, HTSUSA, and, in NYRL 890570 of October 20, 1993, (amended by supplemental letter of October 28, 1993) Customs classified five styles of women's woven boxer-styled sleep shorts (all sold with a coordinating upper body garment) in subheadings 6208.21.0010, HTSUSA and 6208.21.0020, HTSUSA. Customs Headquarters believes the conclusions in these rulings that the garments at issue therein would be principally used as sleepwear and should be classified as such are correct. These are rulings which Customs is able to identify and intends to modify to conform with HRL 956202. The error in the rulings was not the conclusion that the garments were sleepwear, but the classification of the garments at the subheading level in the provision for pajamas. Any other Customs ruling on virtually identical merchandise in which

the goods were classified in the provision for pajamas are also subject to this notice.

In order to be classified in the provision for nightdresses and pajamas, a garment must be one of the named articles. In Headquarters Ruling Letter 088635 of May 24, 1991, the meaning of the term "pajamas" was examined and it was determined that the common meaning of the term required top and bottom garments and that "pajama bottoms" or sleep bottoms without pajama tops are not classifiable as pajamas.

It follows that the women's sleepwear bottoms which were the subject of the previously cited rulings cannot be classified in the provision for nightdresses and pajamas. Although not classifiable as pajamas, these garments may be classified as "other similar articles" in the "other" provision of heading 6208, HTSUS.

The rationale for classification of the garments at issue in heading 6208, HTSUS, as similar to nightdresses and pajamas lies in the rule of statutory construction known as *ejusdem generis*. In *Van Dale Industries v. United States,* Slip Op. 94–54, (April 1, 1994), in discussing *ejusdem generis,* the Court of International Trade stated:

> One rule of statutory construction is *ejusdem generis,* which means "of the same kind, class, or nature." *Black's Law Dictionary* 464 (5th ed. 1979). This rule applies "whenever a doubt arises as to whether a given article not specifically named in the statute is to be placed in a class of which some of the individual subjects are named." *[United States v. Damrak Trading Co., Inc.,* 43 CCPA 77, 79, C.A.D. 611 (1956).] Under *ejusdem generis,* where particular words of description are followed by general terms, the latter will be regarded as referring to things of a like class with those particularly described. *Id.* In other words, *ejusdem generis* requires that merchandise possess the particular characteristics or purposes that unite the specified exemplars in order to be classified under the general terms. *See, Nissho-Iwasi Am. Corp. v. United States,* 10 CIT 154, 157, 641 F. Supp. 808, 810 (1986) (citations omitted).

Heading 6208, HTSUS, specifically provides for women's and girls' singlets and other undershirts, slips, petticoats, briefs, panties, nightdresses, pajamas, negligees, bathrobes, dressing gowns and similar articles. To apply *ejusdem generis,* Customs must ascertain the shared characteristics or purposes of the named garments in heading 6208, HTSUS.

All of the articles named in heading 6208, HTSUS, may be characterized as "intimate apparel". They are garments which are recognized as either underwear (the singlets and other undershirts, slips, petticoats, briefs and panties), sleepwear (the nightdresses, pajamas and negligees), or garments normally worn indoors in the presence of family or close friends (the negligees, bathrobes and dressing gowns). The explanatory note for heading 6208 describes the scope of the heading as including women's or girls' underclothing and, after naming the last five exemplars, "garments usually worn indoors". While the explanatory notes contained in the *Harmonized Commodity Description and*

Coding System Explanatory Notes are not legally binding, they do represent the international interpretation of the Harmonized System and provide guidance in determining the scope of the various headings.

As Customs believes the garments in the previously named rulings were properly classified in heading 6208, HTSUS, based on the examination of the garments by Customs which determined that the garments were sleepwear, it is only the subheadings in which the garments were classified that is viewed as an error. Clearly, these garments were of a type which may be characterized as "intimate apparel", *i.e.*, garments which are either worn under other apparel (undergarments) or, garments which are not worn outside the home and when worn in the home would be worn only in the presence of family or intimate friends. Therefore, Customs intends to modify these decisions to reflect the proper classification of the garments in subheading 6208.91.3010, HTSUSA, if of cotton or in subheading 6208.92.0030, HTSUSA, if of man-made fibers. These subheadings provide for, inter alia, women's other garments similar to nightdresses, pajamas, negligees, bathrobes, and dressing gowns.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

AUTHORITY

This notice is published pursuant to 5 U.S.C. 552(a)(1)(D). Publication of this notice in the Federal Register pursuant to the foregoing provision provides a higher degree of notice than that required under section 625 of the Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057, (hereinafter section 625). Accordingly, it is Customs position that publication pursuant to section 625 is unnecessary. Customs is using Federal Register publication 1) because all rulings to which this notice relates may not have been identified, 2) in order to ensure a uniform and consistent position with respect to classification of this merchandise at an early date, 3) to assist Customs in its responsibility to administer informed compliance with respect to the trade community, and 4) as an aid to the importing community in exercising reasonable care with respect to importations of merchandise subject to this notice.

COMMENTS

Before modifying these inconsistent rulings, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), section 1.4, Treasury Department Regulations (31 CFR 1.4), and section 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days

between the hours of 9:00 and 4:30 p.m. at the Office of Regulations and Rulings, Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, DC.

GEORGE J. WEISE,
Commissioner of Customs.

Approved: August 14, 1995.

DENNIS M. O'CONNELL,
Acting Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, August 18, 1995 (60 FR 43183)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 95–142)

ACCIAI SPECIALI TERNI, S.P.A., ILVA S.P.A. (IN LIQUIDATION), AND ILVA USA, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND ALLEGHENY-LUDLUM CORP., ET AL., DEFENDANT-INTERVENORS

Consolidated Court No. 94–07–00398

[ITC affirmative determination as to grain-oriented silicon electrical steel from Italy and Japan sustained.]

(Dated August 7, 1995)

Rogers & Wells (William Silverman, Douglas J. Heffner and *Stephen J. Claeys)* for plaintiffs Acciai Speciali Terni, S.p.A.; ILVA S.p.A. (in liquidation) and ILVA USA, Inc.

Steptoe & Johnson (Daniel J. Plaine, Edward J. Krauland, Mark A. Barnett, Maury D. Shenk and *Kent D. Bressie)* for plaintiffs Nippon Steel Corporation and Kawasaki Steel Corporation.

Lyn M. Schlitt, General Counsel, *James A. Toupin,* Deputy General Counsel, Office of the General Counsel, United States International Trade Commission *(James M. Lyons)* for defendant.

Collier, Shannon, Rill & Scott (David A. Hartquist, Michael J. Coursey, Kathleen W. Cannon and *Mary T. Staley)* for defendant-intervenors Allegheny-Ludlum Corp.; Armco, Inc.; the Butler Armco Independent Union; the United Steelworkers of America; and the Zanesville Armco Independent Union.

OPINION

RESTANI, *Judge:* This matter is before the court on the parties' cross-motions for judgment upon the agency record, which challenge the affirmative material injury determination by the United States International Trade Commission ("ITC" or "Commission") with respect to certain grain-oriented silicon electrical steel ("GOES") from Italy and Japan that was found to be subsidized and/or sold at less than fair value ("LTFV"). *Grain-Oriented Silicon Electrical Steel from Italy and Japan,* USITC Pub. No. 2778, Inv. Nos. 701–TA–355 and

731–TA–660 (May 1994) (final affirmative determ.) *("Final Det.")*[1] and *Grain-Oriented Silicon Electrical Steel from Italy,* USITC Pub. No. 2800, Inv. No. 731–TA–659 (Aug. 1994) (final affirmative determ.); 59 Fed. Reg. 28,561 (USITC 1994) (final) and 59 Fed. Reg. 42,285 (USITC 1994) (final) respectively.

I. FACTS

Defendant-intervenors Allegheny-Ludlum Corporation, Armco, Inc., the Butler Armco Independent Union, the Zanesville Armco Independent Union, and the United Steelworkers of America are domestic manufacturers of GOES products, or unions related to the manufacture of these products. GOES, a flat-rolled steel product, is used in the manufacture of the cores of power and distribution transformers, as well as specialty transformers. *Final Det.* at II–4 *("Pub. Staff Rpt.")*. GOES is sold in sheet or strip form and possesses superior magnetic properties, including higher permeability and lower core loss, which make it a more efficient conductor than non-grain-oriented silicon electrical steel. *Id.*

GOES is differentiated by grades, with specifications that identify separate core-loss designations for conventional and high-permeability product types.[2] *Id.* at II–5. Within each grade, the average core loss of a product may vary from producer to producer. *Id.* Transformer manufacturers diverge in their approach to assessing a grade of GOES for purchase. Manufacturers of industrial transformers generally do not evaluate core-losses, and usually select M–6 grade. *Id.* at II–30. Power and distribution transformer bids that are solicited by utility companies are evaluated by a "total ownership cost" ("TOC") model. *Id.* at II–30–II–31. Utilities usually do not specify the grade of GOES required for use in a transformer design, but rather indicate other characteristics that affect a transformer manufacturer's selection of grade, such as the amount, in dollars per watt, at which core loss and windings loss are evaluated by the utility, maximum limits for loss, impedance, and weight. *Id.* at II–31. As a result, nearly all transformers sold to utilities are custom-designed to meet the requirements contained in a utility company's request for quotes. *Id.*

Some GOES, mostly M–6 grade, is used predominantly by stampers to punch laminations for use in equipment employing smaller transformers, such as appliances and aerospace, aeronautical and electronic equipment.[3] *Id.* at II–8. In general, the production process varies for high-permeability GOES as compared with conventional GOES. *Id.* For

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[1] The Commission made two determinations because the United States Department of Commerce postponed its final determination of LTFV sales relating to imports from Italy. The ITC's statements in the determinations are identical, thus from hereon the court cites only to the Commission's first determination concerning GOES.

[2] The grades M–2 through M–6 are assigned to various gauges of conventional grade GOES with low energy efficiency. *Pub. Staff Rpt.* at II–5 & n.12. The grades M–0H through M–4H apply to high-permeability grade GOES with lower core losses. *Id.*

[3] Within the grade of M–6 GOES, there is a distinction between "shearing" quality and "punching" quality. All M–6 grade GOES begin as shearing quality, as the product exists in standard width coil form to be later slit and cut to length. *See* Def.'s App. to Mem. & n.41. in Opp'n to Pls.' Mots. J. Agency R., Conf. Doc. 7, at 41 & n.41. Punching quality M–6 is shearing quality M–6 that has undergone an additional pickling process. *Id.*

instance, in the manufacture of high-permeability permanently domain-refined ("PDR") GOES, the product is etched by laser to improve magnetic properties, and further coated to improve electronic resistance. *Id.* at II–6 & n.25, II–8.

A. *Parties' contentions:*

On August 26, 1993, defendant-intervenors filed with the Commission and the International Trade Administration of the United States Department of Commerce ("Commerce") their petitions alleging that the domestic GOES industry was materially injured or threatened with material injury by reason of subsidized and/or LTFV imports from Italy and Japan. In October 1993, the Commission made preliminary determinations, finding there existed a reasonable indication that the domestic industry producing GOES was materially injured or threatened with material injury by reason of the subject imports from Italy and Japan. The Commission published the final results of its investigations on June 2, 1994 and August 17, 1994, respectively.

Motions for judgment upon the agency record pursuant to USCIT Rule 56.2 have been filed by (1) Acciai Speciali Terni, S.p.A., ILVA S.p.A. (in liquidation) and ILVA USA, Inc. (collectively "Acciai Speciali" or "Acciai"), and (2) Nippon Steel Corporation and Kawasaki Steel Corporation (collectively "Nippon Steel"), contesting portions of the determination. Acciai Speciali challenges the Commission's causation analysis with respect to volume and price effects of imports from Italy. Nippon Steel argues in its motion that the Commission failed to undertake a segmented analysis as to Japanese imports, and also challenges the Commission's causation analysis as to volume and price effects of imports from Japan. Lastly, Nippon Steel asserts a deprivation of its right to due process. Nippon Steel specifically challenges the Commission's rejection of Nippon Steel's comments sent in response to information submitted by domestic producers late in the investigation. Defendant and petitioners oppose these motions.

B. *ITC's determination:*

The majority of the Commission found that imports from both Italy and Japan caused material injury.[4] The Commission noted that nearly all of the Italian imports consisted of low-efficiency conventional grade M–6 GOES, while the majority of Japanese imports was composed of high-permeability GOES. *Final Det.* at I–12–I–13. The Commission concluded that the low-efficiency Italian M–6 grade and the Japanese high-permeability GOES were not sufficiently fungible to support a finding of a reasonable overlap of competition, thus the Commission did not cumu-

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[4] Four commissioners participated in the determinations relating to imports from Italy. The plurality opinion was joined by Commissioners Rohr and Nuzum. Commissioner Newquist's separate material injury determination in which he cumulated Japanese and Italian imports is not challenged here. *See Final Det.* at I–12 n.66. Commissioner Crawford dissented from the determination of material injury caused by reason of imports from Italy. *Id.* at I–3 n.2.

Five commissioners participated in the determination relating to Japan. All commissioners concurred in the finding of material injury to the domestic injury by reason of Japanese imports. Commissioners Crawford and Newquist made separate additional determinations.

late the subject countries' imports for purposes of assessing present material injury. *Id.* at I–13–I–14.

With regard to Italian imports, the Commission found that volume increased over the period of investigation ("POI") in both absolute and relative terms, while total apparent domestic consumption declined. Def.'s App. to Mem. in Opp'n to Pls.' Mot. J. Agency R., Conf. Doc. 57, at I–15 *("Conf. Final Det.")*. The Commission noted that several large purchasers had indicated they would have purchased domestic grade M–6 GOES if the imported price had increased by as little as 5 percent. *Final Det.* at I–15. The Commission found evidence of underselling, and determined that, when combined with a steady decrease in price of Italian imports, depression of prices for M–6 GOES resulted, causing domestic prices in 1993 to dip below 1990 levels. *Id.* The domestic industry's market share declined throughout the period, from just under 80 percent in 1990 to below 74 percent in 1993. Def.'s App. to Mem. in Opp'n to Pls.' Mot. J. Agency R., Conf. Doc. 56, at II–51 tbl. 17 *("Conf. Staff Rpt.")*; *see Conf. Final Det.* at I–15. With regard to the impact upon the domestic industry, the Commission observed reduced revenue, a decline in domestic production and capacity utilization, and higher production costs, plus a decline in domestic shipment volume and market share. *Final Det.* at I–16.

The Commission also found that with regard to Japanese imports, volume increased over the POI, with the largest increase in 1993, while total apparent domestic consumption declined during the POI. *Id.* Although the market share for Japanese imports declined in 1993, the Commission ascribed this result to reduced U.S. shipments of Japanese imports, rather than to lower Japanese imports overall. *Id.* The Commission found evidence of underselling in two product categories in which the domestic and subject imports were most directly competitive.[5] For M–3 grade GOES, Japanese import prices were found to decline at a faster rate than prices for domestic M–3, which coincided with a decline in the financial performance of the domestic industry. *Id.* at I–17. Purchaser prices for Product 4, the highest volume high-permeability grade of Japanese GOES, were found to show consistent underselling throughout the period, with an increasing margin of underselling between 1991 and 1993. *Id.* The Commission determined that lower domestic production volumes and capacity utilization percentages reflected reduced market share for the domestic industry, and that price underselling by nearly one half of the quantity of Japanese imports suppressed domestic producers' ability to raise prices and resulted in losses in 1992 and 1993. *Id.*

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[5] Pricing Product 3 consisted of data for M–3 grade or conventional GOES. *Conf. Staff Rpt.* at II–54. Pricing Product 4 consisted of data for high-permeability domain-refined GOES for stacked core applications. *Id.* Pricing Product 5 consisted of data for high-permeability non-domain-refined GOES, while pricing Product 6 consisted of high-permeability PDR GOES, and both products were used in wound core applications. *Id.*

II. Standard of Review

The scope of review of an ITC determination is whether it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988) (current version at 19 U.S.C.A. § 1516a(b)(1)(B)(i) (West Supp. 1995)). The court cannot substitute its judgment for that of the agency, nor may it reweigh the evidence. *R-M Indus., Inc. v. United States*, 848 F. Supp. 204, 207 (Ct. Int'l Trade 1994).

III. Discussion

To determine whether material injury is caused by LTFV or subsidized imports under investigation, ITC is required to consider the volume of imports, their effect and impact on domestic prices and production, and other relevant economic factors. *See* 19 U.S.C. § 1677(7)(B) (1988). The Commission, in its evaluation of the volume of imports under investigation

> shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.

19 U.S.C. § 1677(7)(C)(i). In its analysis of price effects of imports on domestic prices, the Commission must consider whether

> (I) there has been significant price underselling by the imported merchandise as compared with the price of like products of the United States, and
> (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

Id. § 1677(7)(C)(ii). For the examination of the impact of imports, the statute requires that the Commission evaluate all relevant factors, including, but not limited to,

> (I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,
> (II) factors affecting domestic prices,
> (III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment, and
> (IV) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the like product.

Id. § 1677(7)(C)(iii) (current version at 19 U.S.C.A. § 1677(7)(c)(iii) (West Supp. 1995)). Section 1677(7)(C)(iii) also requires the Commission to evaluate those relevant economic factors described within the context of the business cycle and conditions of competition. Id. The court will discuss each contention raised by the parties.

A. *Material injury caused by Italian imports:*

Acciai asserts that the Commission failed to provide a reasoned causation analysis, that is, it failed to explain how the increased volume and market share of imports of the subject merchandise from Italy caused the loss of domestic producers' market share. Acciai argues further that the Commission's findings as to price suppression and depression caused by Italian imports are not supported by evidence in the record. Defendant and defendant-intervenors support the Commission's determination.

1. *Volume effects:*

With regard to the adequacy of the Commission's discussion concerning volume effects, Acciai contends that the majority's analysis failed to establish a rational connection between the increase in Italian imports and the resultant injury to the domestic industry. Acciai asserts that evidence in the record contradicts the alleged presumption made by the Commission that increases in Italian import volume and market share were related to losses experienced in the domestic industry.

The Commission determined that the increased volume and market share for Italian imports were significant, in light of the relative interchangeability of the domestic product and subject imports, the reduction in apparent domestic consumption, and the decline in domestic market share. *Conf. Final Det.* at I–15; *see Conf. Staff Rpt.* at II–50. The Commission noted that the majority of Italian imports consisted of M–6 grade, and these imports were used interchangeably with domestic product. *Final Det.* at I–15. The Commission also found that competition with imports was to a significant degree based upon price, and that Italian import prices were lower than domestic prices during the POI. *Id.* With these factors in mind, the Commission observed that during the POI, the volume of Italian imports increased by more than one third, market share grew substantially, and the largest increase in volume occurred in 1993. *See Conf. Staff Rpt.* at II–48 tbl. 16, II–51 tbl. 17.

Acciai does not challenge the volume and price data upon which the Commission relied, but rather argues that the Commission ignored evidence in the record that was contradictory to a finding of a causal link between the subject imports and the condition of the domestic industry. Specifically, Acciai relies upon the lack of confirmed lost sales experienced by domestic producers, the cessation of one domestic producer's manufacture of M–6 grade product, and assessments concerning market share reached by Commission staff contained in an economic memorandum supplied to the Commission. Acciai also argues that the Commission's finding that price was an important factor was contradicted by purchaser questionnaire responses.

a. Lost sales evidence:

Acciai asserts that because lost sales evidence often supports a finding of a causal link between the volume of imports and decline in domestic industry market share, absence of such evidence invalidates a finding that imports displaced domestic products. Here, two U.S. producers

alleged 11 instances of lost sales due to Italian imports, but none of these allegations could be confirmed as resulting from import pricing. *Conf. Staff Rpt.* at II–73–II–76.

The court does not agree with Acciai's reasoning. First, anecdotal lost sales evidence is difficult to gather. Purchasers have little incentive to confirm allegations. Second, in *Gifford-Hill Cement Co. v. United States*, 9 CIT 357, 367–68, 615 F. Supp. 577, 585 (1985), this court determined that the Commission was not required to "rest its decision on either lost sales or lost revenues," because these "may be only two possible signals of impact." This court also noted that "[n]either the presence nor the absence of any factor listed in [19 U.S.C. § 1677] can necessarily give decisive guidance with respect to an injury determination." *Id.* at 368 n.12, 615 F. Supp. at 585 n.12. Rather, for fungible products it is volume that may demonstrate best any evidence of domestic producers' lost sales. *Id.* at 368, 615 F. Supp. at 586. Here, it is clear that the Commission reviewed volume data in connection with evidence of trends in domestic consumption, price and domestic shipments. The Commission was not in error in not finding the lack of confirmed lost sales evidence determinative.

b. Reduction in domestic production:

Acciai also contends that the Commission failed to find a correlation between the decrease in domestic producers' market share and the cessation of M–6 production by one producer, as supported by evidence from certain U.S. purchasers. Allegedly, as a result one U.S. customer increased its import purchases to maintain a source of supply. Acciai contends that the producer at issue was forced out of business because of competition from another domestic producer, rather than competition from lower-priced Italian imports. Defendant responds that the timing of the U.S. producer's withdrawal from M–6 production does not correlate with volume and market share data. Defendant-intervenors insist that other evidence in the record indicates that the U.S. producer ceased M–6 production as a result of import pricing, and an inability to receive commitments from a U.S. purchaser for sufficient purchase quantities to warrant production.

Acciai further claims that an additional explanation for the increase in Italian imports is that another U.S. customer increased its purchases as a result of a domestic producer's refusal to supply certain quantities of shearing quality steel. Defendant maintains that the evidence does not support this explanation either.

Evidence before the Commission regarding cessation of production was conflicting. The relevant U.S. producer discontinued manufacture of M–6 grade during the second half of 1993. *See* List 2, Doc. 47, Attach. D (letter from U.S. producer to U.S. purchaser dated May 5, 1993 indicating end date for production). The evidence indicates that from 1990 up to 1993, this producer lost all but one of its customers that purchased punching quality steel, and in 1993 the producer requested a quantity commitment from the remaining customer in order to continue produc-

tion. Def.-Ints.' App. to Mem. in Opp'n to Pls.' Mot. J. Agency R., Tab 3, at 35–36 (Tr. of Apr. 12, 1994 proceedings before ITC). This customer did not agree to purchase the M–6 grade quantity proposed. *See* List 2, Conf. Doc. 47, Attach. D; Acciai's App. to Mem. in Supp. Mot. J. Agency R., Tab 7, at 2–3. In its questionnaire response, this same customer indicated that it had increased its purchases of Italian M–6 grade product significantly in 1991 and 1992. Def.'s App. to Mem. in Opp'n to Pls.' Mots. J. Agency R. ("Def.'s App."), Conf. Doc. 64.46, at 7. Thus, there is substantial evidence that sales were lost to imports, rather than to other domestic producers. In its determination, the Commission cited to the testimony of the U.S. producer to support its related conclusion that apparent domestic consumption was in decline, and that there was decreased demand for the domestic M–6 grade. *Final Det.* at I–16 & n.100.

As to the increased purchase of imported shearing quality M–6, the customer's questionnaire response is not consistent with its claim that its domestic purchases fell off due to the domestic producer's refusal to supply. The questionnaire data indicates that the customer's domestic purchases overall, for both punching grade and shearing quality steel, fell dramatically between 1990 and 1993, at the same time that its purchases of Italian imports more than doubled. Def.'s App., Conf. Doc. 64.39, at 7, 26–27. Further, as early as 1990, this purchaser bought shearing quality steel from the Italian producer in large quantities as compared with its domestic purchases. *Id.* at 27. Thus, the Commission's finding on this issue is supported by substantial evidence.

c. Economic memorandum:

In connection with a quantitative analysis of the effects of dumped and subsidized imports upon the domestic GOES industry, the Commission staff prepared a memorandum for the Commission, which, *inter alia,* estimated the market share percentage for domestic products in the absence of Italian imports. Economic Mem. to Commission from International Economist, List 2, Doc. 54 (EC–R–051), at 32, 34 tbl. 1 (May 16, 1994). The Commission staff indicated that the estimated market share was close to the actual domestic market share in 1993. *Id.* Thus, according to this estimate, domestic producers would have gained little or no market share if Italian imports were not present in the market.

The economic memorandum was formulated prior to the issuance of Commerce's final determinations of dumping margins, which were higher for Italian imports than were the estimated margins used in the economic memorandum. *See Grain-Oriented Electrical Steel from Italy,* 59 Fed. Reg. 33,952 (Dep't Comm. 1994) (final determ. of LTFV sales). The Commission did not cite to this memorandum in its majority determination,[6] but rather relied upon more current record evidence in support of its finding of volume effects based upon displacement of domestic

[6] Commissioner Crawford, in her dissent, relies upon this memorandum for purposes of discussing the elasticities of demand, substitution, and domestic supply for the subject imports. *Final Det.* at I–26–I–27 & nn.147–51.

industry shipments. Acciai asserts that the assessment of the evidence in the memorandum, which was submitted to the Commission, is binding.

The court finds that Acciai's view of the weight of the interpretations of data contained in the memorandum is too restrictive. Were the Commission to be bound by each of its preliminary observations made by staff concerning data, the Commission's ability to apply a variety of analyses would be likely limited. This memorandum was one of many documents the Commission had available to it in assessing the record data, and the Commission possesses considerable discretion to assign weight to any given factor in reaching its injury determination. *See USX Corp. v. United States*, 12 CIT 844, 846–47, 698 F. Supp. 234, 237 (1988). The Commission considered the impact of Italian imports in conjunction with its observations concerning the relative substitutability between imports and the domestic product. *See Final Det.* at I–15. It was not unreasonable for the Commission to reach a conclusion regarding impact of imports, based upon the facts in the record, that varied from the theoretical economic model used by staff. Thus, the Commission's findings concerning volume and causation are not undermined significantly by the analyses contained in the staff memorandum.

d. Importance of price and substitutability:

The court finds that the majority performed a reasoned analysis of the relationship between the increase in volume and market share of Italian imports and the concurrent decline in domestic product volume and market share. Directly related to this analysis were the Commission's findings concerning the importance of price and the level of substitutability among domestic and imported GOES products. The Commission observed that certain purchasers of a large quantity of M–6 grade indicated that price was a determining factor in their purchase decisions. *Id.* The Commission acknowledged that several large purchasers of GOES stated in questionnaire responses that an increase in import price by as little as 5 percent would be motivation to switch to domestic products. *Id.*

Acciai Speciali asserts that the Commission's finding as to the importance of price is exaggerated, because the only two purchasers of M–6 that might meet the Commission's description noted elsewhere in their questionnaire responses that factors other than price were also important to their purchase decisions. Acciai Speciali further argues that these purchasers accounted for less than one third of the purchases by volume made over the POI. Defendant responds that Acciai Speciali's characterization of the data is misleading, as these purchasers bought nearly 50 percent of total Italian imports in 1993, and more than 50 percent of the *increase* in imports over the entire period. *See Conf. Staff Rpt.* at II–67; Def.'s App., Conf. Doc. 64.34, at 7 ("Conf. Doc. 64.34"); Conf. Doc. 64.37, at 7 ("Conf. Doc. 64.37"). During the POI, these same purchasers also significantly reduced their purchases of domestic products. *See* Conf. Doc. 64.34, at 7; Conf. Doc. 64.37, at 7.

The Commission's findings concerning the importance of price are supported by the evidence. The two purchasers of M–6 referred to above indicated in their questionnaire responses that a 5 to 10 percent rise in import price would cause them to purchase domestic products. *See* Conf. Doc. 64.34, at 22; Conf. Doc. 64.37, at 22. Acciai Speciali emphasizes that these purchasers in particular, as well as other purchasers, did not list price as the most important factor in their decisionmaking, thus the Commission's analysis on this point is flawed and impairs its causation analysis. The court does not agree. While it is an accurate statement that these and other M–6 purchasers did not list price as the most important factor, price was listed as a very important factor. *See* Def.-Ints.' App. to Mem. in Supp. Mot. J. Agency R. at Tab 1 (purchaser responses to question IV.6, at 20).

Further, one of the two large purchasers stated that it found the quality of domestic and imported products to be comparable. Conf. Doc. 64.37, at 21. This purchaser listed price as an important factor after product quality and timely delivery, *id.* at 12, but the purchaser also stated that it would switch supply in the event of a 10 percent increase in import price. *Id.* at 22. Although one might argue that this document is somewhat internally inconsistent as to the weight given to price by this purchaser, to the court the document appears supportive of the Commission's conclusion.

2. *Price depression and suppression:*

Acciai Speciali argues that the Commission's analysis of price effects is also flawed. Acciai asserts that the Commission's conclusions are not supported by the record. Further, Acciai contends that the price data undermines the Commission's price suppression analysis, because domestic producers were able to increase M–6 prices in several instances during the period. Also, Acciai alleges that evidence in the record contradicts the Commission's finding that domestic producers were unable to cover their increasing production costs due to price pressure from Italian imports. Defendant and defendant-intervenors contest all of these assertions.

The Commission found that in price comparisons for both categories of M–6 grade GOES, Italian imports undersold domestic product in 27 of 30 quarters, and the highest margin of underselling was over 15 percent. *Final Det.* at I–15. The margin of underselling frequently exceeded the 5 to 10 percent price increase certain purchasers stated they could absorb. The Commission determined that this underselling, in combination with steady decreases in import price, depressed domestic prices to a level lower than that of 1990. *Id.* The Commission noted that purchaser information demonstrated that the margin of underselling increased substantially over the period. *Id.*

Regarding the Commission's price depression finding, Acciai mischaracterizes the importance of the pricing data, and misinterprets the Commission's support for its conclusions. Acciai's first argument is based in part upon a quarter-by-quarter comparison of prices for two

M–6 pricing products, to identify any decreases in domestic price in response to a decrease in import price in the prior quarter. *See* Acciai's Mem. in Supp. Mot. J. Agency R. at Attach. 1 (charts of weighted-average net price and delivered price data contained in *Conf. Staff Rpt.*, II–56–II–57 tbls. 18, 19; App. I, tbls. I–1, I–2). The data indicate that for pricing Product 1 (punching quality), of which the majority of M–6 imports is comprised, domestic price fluctuated slightly, and decreased overall. *Conf. Staff Rpt.* at II–56 tbl. 18. The data for pricing Product 2 (shearing quality) indicate greater fluctuations in price. *Id.* at II–57 tbl. 19. Both sets of data support the prevalence of underselling by Italian imports. The quarterly data do not show that domestic prices decreased consistently in response to import pricing. As defendant has noted, however, there is no requirement that the Commission assess the price-depressing or suppressing effects of imports in any particular manner. *Cemex, S.A. v. United States*, 16 CIT 251, 261, 790 F. Supp. 290, 299 (1992), *aff'd without op.*, 989 F.2d 1202 (Fed. Cir. 1993). In this instance, the fact that domestic price changes were not synchronous with changes in import pricing does not establish a lack of price effects. Pricing changes may be delayed or may occur in part due to other factors.

Acciai's second argument is that the Commission's statements about price depression are supported by weak evidence. In its discussion of price effects, the Commission cited to several portions of the Staff Report. *See Final Det.* at I–15 nn.98–99. These portions include text of the Staff Report discussing the underselling data contained in Tables 18 and 19, purchasers' comments from questionnaire responses regarding amounts of increases in import pricing that would cause purchasers to switch to domestic supply, and lost sales and revenue allegations. *Id.* The lost revenue allegation referred to was confirmed by Commission staff, although the lost sales allegations were not. It is clear, however, that even without reference to anecdotal evidence, the Commission's assessment of underselling and price depressing effects is supported by the weighted-average price data from producers and importers, and the purchaser price data. *See Conf. Staff Rpt.* at II–56–II–57 tbls 18, 19; App. I, tbls. I–1, I–2.

For the same reasons, Acciai's objections to the Commission's price suppression analysis also fail. Merely because domestic producers were able to increase M–6 prices in several instances during the period does not undermine the importance of data demonstrating consistent underselling. The data clearly substantiate that the domestic industry was unable to sustain a price increase because of price pressure from lower priced imports. Acciai emphasizes that the evidence of some price increases contradicts the Commission's determination that Italian imports "prevented, to a significant degree, the domestic producers from increasing prices as their cost of goods increased." *See Final Det.* at I–15. The court finds Acciai's reading of the Commission determination too narrow, as the Commission did not state that producers were unable to increase prices in every instance.

Acciai also points to other evidence that contradicts the Commission's conclusion. Acciai construes portions of the Staff Report to show that domestic producers were unable to cover increasing costs because of yield problems associated with high-permeability products, reduction in export sales, and increased depreciation costs. *See Conf. Staff Rpt.* at II–30, II–33–II–34. The Commission considered this evidence in reaching its determination, *see Final Det.* at I–11 nn.56 & 60, but still concluded that the subject imports were a cause of material injury. Although Acciai offers its alternative view of the evidence, including the pricing data, the Commission's determination is supported by substantial evidence, and will not be disturbed. *See Matsushita Elec. Indus. Co. v. United States,* 750 F.2d 927, 936 (Fed. Cir. 1984) (finding role of court is not to decide whether it would reach same decision as ITC on basis of evidence).

B. *Material injury caused by Japanese imports:*

Nippon Steel also argues that the Commission failed to provide a reasoned causation analysis. Specifically, Nippon argues that the Commission failed to consider market segmentation as a condition of competition. Nippon further alleges that the Commission erred in its analysis of volume and price effects, and disregarded certain record evidence relevant to its causation analysis. Defendant and defendant-intervenors oppose each of these assertions.

1. *Market segmentation:*

Nippon Steel alleges that the Commission discussed import volumes and price effects without acknowledging a critical feature of competition in the GOES market. Nippon Steel maintains that the GOES market is divided into two segments with dramatically different trends: high-permeability GOES and conventional GOES, which includes grades M6 through M2. Nippon Steel asserts that the existence of these two market segments precludes a finding of significant competition between Japanese imports and the domestic like product. Defendant and defendant-intervenors argue that the Commission properly did not make a finding of different market segments, thus the Commission was not in error in declining to evaluate volume and price effects only within the segment of high-permeability GOES.

During the investigations, the Commission considered whether high-permeability and conventional grades of GOES constituted one like product.[7] *Final Det.* at I–6. The Commission determined that the evidence supported a finding of a single like product, as there were no clear dividing lines among different grades of GOES. *Id.* at I–8. The Commission found that to a certain degree grades of GOES were interchangeable, within one grade level above. *Id.* at I–7. The Commission also determined that most Japanese imports of high-permeability grade and

[7] Nippon Steel argued in the preliminary investigations that there were two like product groups, but did not raise this argument during the final investigations. *Final Det.* at I–6 n.16.

all of imported M–3 grade steel competed directly with domestic products. *Id.* at I–16.

Nippon Steel argues that the Commission's determination was incongruous, because it recognized market segmentation in its cumulation analysis, but refused to acknowledge evidence of market segments in its causation analysis. In its cumulation analysis, the Commission indicated that because in general there was a lack of overlap of competition between the M–6 grade Italian imports and the high-permeability imports from Japan, these imports were not cumulated for material injury purposes. *Id.* at I–13, I–14; *see* 19 U.S.C. § 1677(7)(C)(iv)(I). The Commission did not articulate in its cumulation analysis that lack of overlap of competition between imports resulted in segmentation into two distinct markets. The Commission instead found that Japanese imports were concentrated in the high-permeability grade products, while the Italian imports were concentrated in one grade of GOES. *Final Det.* at I–12–I–13. The Commission also determined that cross-grade competition existed within and between the conventional and high-permeability grades. *Id.* at I–8.

Nippon Steel relies upon *Grupo Indus. Camesa v. United States,* 853 F. Supp. 440 (Ct. Int'l Trade 1994), for the proposition that the Commission was required here to discuss market segmentation in its causation analysis. The court in *Grupo,* in upholding the Commission's determination, found that the Commission had considered but declined to adopt the segmented market argument presented, on the basis that a reasonable degree of direct competition existed between the imported and domestic products at issue. *Id.* at 444.

As in *Grupo,* the court finds here that the Commission acknowledged and reasonably rejected the view that because of market segmentation the imported product did not compete with the domestic product, thus the Commission properly rejected a market segmentation approach in its causation analysis. The Commission discussed in detail its observations concerning evidence of relative substitutability and interchangeability among the various grades of GOES. *See Final Det.* at I–7–I–8. The Commission apparently determined that the domestic GOES industry manufactures a single like product, within which there are grades of GOES products along a continuum, and subject imports from two countries compete with the domestic product, although at different points along the continuum. *See id.* at I–8. This finding was not unreasonable or unsupported. Additionally, the Commission has found previously that products within a like product group may not be completely interchangeable as to end use. *See, e.g., Aramid-Fiber Formed of Poly Para-Phenylene Terepthalamide from the Netherlands,* USITC Pub. 2783, Inv. No. 731–TA–652, at I–8 (June 1994) (final); *Certain Steel Wire Rod from Brazil and Japan,* USITC Pub. 2761, Inv. Nos. 731–TA–646 and 648, at I–8–I–9 (Mar. 1994) (final).

Further, Nippon Steel has not demonstrated a requirement that where there is a single like product and, in a cumulation context, insuffi-

cient overlap among subject imports, that a segmented market analysis with regard to causation is necessarily warranted. Nippon Steel's citation to the determination in *New Steel Rails from Japan, Luxembourg, and the United Kingdom,* USITC Pub. 2524, Inv. Nos. 731–TA–557–559, at 19 (June 1992) (prelim.), does not warrant a different result. In *New Steel Rails,* the Commission expressly undertook a segmented analysis to account for a dramatic shift in overall demand from a standard rail to a premium rail product. *Id.* at 18–19 & n.90 (citing *Copperweld Corp. v. United States,* 12 CIT 148, 162, 682 F. Supp. 552, 566 (1988)). The court in *Copperweld,* however, declined to adopt plaintiffs' reasoning that price data from service centers and end users should have been weighed proportionally, noting that neither the governing statute nor its legislative history requires adoption of any particular analysis where a market may consist of several segments. 12 CIT at 162, 682 F. Supp. at 566.

The court also does not find the determination in *Certain Telephone Systems and Subassemblies Thereof from Japan and Taiwan,* USITC Pub. 2237, Inv. Nos. 731–TA–426 and 428, at 39–40 (Nov. 1989) (final), *sustained in Iwatsu Elec. Co. v. United States,* 15 CIT 44, 758 F. Supp. 1506 (1991), to be persuasive here. In *Certain Telephones,* the Commission found only one like product, but further found that the market for the subject merchandise could be subdivided into interrelated submarkets within which the nature of competition varied. *Certain Telephones,* USITC Pub. 2237, at 39–40, 43. There also, the Commission chose a segmented market analysis to account for differences in customer demand within the market. Thus, the Commission has applied a segmented market analysis in reaction to varying levels of customer demand, rather than to adjust for physical differences in the products themselves, as was the issue before the Commission here.

For these reasons, the court finds the Commission was not required to engage in a segmented market analysis in order to complete its determination as to causation properly.

2. *Volume effects:*

Concerning the adequacy of the Commission's discussion of volume effects, Nippon Steel contends that the majority's analysis is result-driven and based upon a narrow portion of the record evidence. Nippon Steel argues that the bulk of the record evidence demonstrates that changes in domestic output and sales over the POI can be explained by the significant decline in exports, a marked increase in non-subject imports, and the recession. Nippon Steel indicates that the evidence establishes that M–2 and M–3 domestic shipments, alleged to compete most strongly with Japanese GOES imports, increased during the period. Lastly, Nippon Steel contends that the Commission's market share analysis is flawed, in that for 1993 data the Commission compared Japanese entries of imports to U.S. shipments, rather than applying the shipment-to-shipment comparison used in prior investigations.

Nippon incorrectly contends that the Commission completely disregarded the evidence of other causes of injury in its causation analysis.

The Commission's determination makes reference to each of the factors noted by Nippon. *See Final Det.* at I–10, I–11 n.56, I–15 n.88. As defendant correctly indicates, while various factors may have contributed to the material injury experienced by the domestic injury, the statute does not require that the subject imports be the sole cause of material injury. *United Eng'g & Forging v. United States,* 15 CIT 561, 580, 779 F. Supp. 1375, 1391 (1991).

Nippon raises two objections to the manner in which the Commission allegedly failed to analyze trends in volume for various GOES grades. Nippon first asserts that the data belies the Commission's presumption that high-permeability Japanese imports displaced the higher-efficiency conventional GOES grades M–2 and M–3. Nippon Steel points to data indicating that U.S. domestic shipments of M–2 and M–3 increased during three of the four years of the POI. This portrayal of the volume data is somewhat misleading, as in 1993 domestic shipments were still below 1990 levels. *See Conf. Staff Rpt.* at F–3 tbl. F–1.

Nippon Steel's second contention is that non-subject import volume in grades M–4 and M–5, grades in which there were no Japanese imports, were the cause of decline in domestic shipments in these grades. The Commission found, however, that to some extent the M–4 grade competed with M–3 grade, thus it was not unreasonable for the Commission to consider the relationship between M–3 Japanese imports and declines in domestic shipments of M–4.

As to the Commission's market share analysis, Nippon Steel insists that the Commission failed to use a shipment-to-shipment analysis for 1993 data, and instead based its analysis upon import volume. Nippon Steel also asserts that the Commission incorrectly found that market share for Japanese imports increased in 1993. Defendant and defendant-intervenors respond that Nippon Steel has misconstrued the Commission's finding, which clearly indicates that the decline in market share held by Japanese imports in 1993 was caused by reduced U.S. shipments of Japanese imports rather than reduced imports. *Final Det.* at I–16. The court finds that Nippon Steel's various objections as to the Commission's analysis of volume effects are either without merit or insufficient to undermine the Commission's conclusions as to volume effects.

3. *Price effects:*

Nippon Steel raises numerous objections to the manner in which the Commission analyzed price effects caused by the subject imports, stating that the evidence fails to establish significant underselling and price depressing and suppressing effects. Nippon also argues that the Commission ignored much of the evidence in the record. Defendant and defendant-intervenors respond that the Commission's finding was supported by the evidence, and that Nippon Steel simply seeks an alternative interpretation of the evidence.

The Commission collected pricing data concerning four groups of products that represented nearly all of the Japanese imports. Products 5

and 6 were not produced by the domestic industry, although domestic producers indicated that M–2 conventional grade did compete with Products 5 and 6, as the end uses for the products were the same. *See* Def.'s App., Conf. Doc. 25, at 77–78 (excerpt from Def.-Ints.' Prehearing Br. dated Apr. 6, 1994). The Commission, however, based its analysis of price data only upon Products 3 and 4.

The Commission observed that in 1992 and 1993 prices for M–3 grade Japanese imports (Product 3), reported by producers and importers, fell at a faster rate than domestic prices and resulted in underselling in the later stages of the POI. *Final Det.* at I–17; *see Conf. Staff Rpt.* at II–58 tbl. 20. The Commission found that this steady decline in M–3 prices was confirmed by purchaser prices reported in questionnaire responses. *Final Det.* at I–17; *see Conf. Staff Rpt.*, App. I, at I–5 tbl. I–3. With regard to pricing Product 4, the high-permeability grade product, the Commission found prices for Japanese imports had increased marginally during the period. *Final Det.* at I–17. The Commission focussed on the purchaser price data, finding evidence of consistent underselling, with an increasing margin during the period. *Id.; Conf. Staff Rpt.*, App. I, at I–6 tbl. I–4. The Commission concluded, on the basis of pervasive underselling of Product 4, the highest volume Japanese import shipped into the U.S. market,[8] that Japanese imports had a severe impact upon the domestic industry. *Final Det.* at I–17.

a. Evidence of underselling and price suppression:

Nippon Steel contends that the Commission erred in its finding that there was evidence of underselling for Product 3. Nippon asserts that the weight of the evidence does not support this view. Nippon points to several facts, including that: 1/ imported M–3 oversold domestic product in 10 of 16 quarters; 2/ purchasers reported overselling in all quarters; 3/ despite the downward trend in price, the volume of imports remained flat; and 4/ the decline in M–3 prices was caused chiefly by a price concession given by a Japanese producer other than Nippon, as assistance to a struggling U.S. purchaser. Defendant responds that despite evidence of overselling, M–3 prices exhibited a significant decline. Defendant further argues that even if evidence of overselling is present, this alone does not undermine the Commission's finding of relative price declines or evidence of underselling in the latter part of the investigation period. *See Kern-Liebers USA, Inc. v. United States*, Slip Op. 95–9, at 68–69 (Jan. 27, 1995) (sustaining finding of price depression/suppression based upon decline in average unit values for German imports, despite fact these values higher than domestic prices), *appeal docketed*, No. 95–1257 (Fed. Cir. Mar. 27, 1995). Thus, the court finds that the Commission's analysis of price effects for Product 3 was not seriously flawed.

In addition, Nippon Steel finds fault with the analysis of pricing data concerning Product 4. Nippon Steel contends that, in contrast to its methodology for Product 3, the Commission analyzed only purchaser

[8] Product 4 represents nearly half of the quantity by volume of total high-permeability Japanese imports. *See Conf. Staff Rpt.* at II–59–II–61 tbls. 21–23.

price data, which reflected delivered prices that included freight costs. Nippon Steel alleges that the Commission was inconsistent in its use of methodology for the two products, and that the Commission should have analyzed the F.O.B. price data for Product 4 as it did for Product 3, because this data demonstrate overselling by Japanese imports in 11 of 16 quarters. *See Conf. Staff Rpt.* at II–59 tbl. 21. Nippon also notes that the Commission's choice of delivered prices for Product 4 is especially questionable given that the difference between delivered and F.O.B. prices for the domestic product is much greater than for imports.

Defendant responds that the Commission selected delivered price data for its analysis of Product 4 because it most clearly demonstrated the impact of imports on the domestic industry. Defendant insists that nonetheless, reliance upon producer/importer price comparisons would not have yielded a dramatically different result, as those comparisons show underselling in three of four quarters in 1993. Defendant asserts that the Commission's conclusion as to underselling and price suppression was reasonable, particularly in light of the fact that the domestic industry experienced losses in this product category in nearly all of the years of the POI.

The court finds that the Commission was not unreasonable in its reliance upon F.O.B. data for analysis of price effects regarding pricing Product 4. This producer/importer pricing data reflects underselling for every quarter of the POI. *Conf. Staff Rpt.*, App. I, at I–6 tbl. I–4. Despite domestic price increases for pricing Product 4 during the period, the Commission could reasonably find that there was underselling by the subject imports, as evidenced in both sets of pricing data, which suppressed domestic price increases. *See id.; Conf. Staff Rpt.* at II–59 tbl. 21. It is within the agency's discretion to select a particular methodology to assess significance of evidence of price undercutting, *Copperweld Corp.*, 12 CIT at 161, 682 F. Supp. at 565, and the choice must be supported by substantial evidence. *Mitsubishi Elec. Corp. v. United States*, 12 CIT 1025, 1050, 700 F. Supp. 538, 558 (1988), *aff'd*, 898 F.2d 1577 (Fed. Cir. 1990). Also, were the Commission instead to have focussed upon the pricing data reported by producers and importers, the data would have supported a finding of price effects as well, because the more recent data demonstrated a trend of underselling at a time when the condition of the domestic industry was in decline.

Nippon Steel also contends that the increase in Product 4 domestic prices runs counter to a finding of negative price effects. The evidence, however, supports the Commission's price suppression finding. During the course of the POI, industry costs rose more than 20 percent, which should have been reflected in prices, but domestic price increases for Product 4 in actuality were minimal. *Conf. Staff Rpt.* at II–32, II–59 tbl. 21; App. I, I–6 tbl. I–4. There is evidence of record that domestic producers responded to price reductions from imports, and thus were unable to realize price increases. *Final Det.* at I–17 n.109; *Conf. Staff Rpt.* at II–71–II–72.

Nippon Steel's final set of objections relates to Products 5 and 6. Nippon contends that the Commission's decision not to consider comparison of price data for these products in its analysis was erroneous, in view of the fact that the Commission acknowledged that these products competed with M–2 grade domestic product. *See Final Det.* at I–6. Defendant responds that because the domestic producers did not manufacture a product identical to Products 5 and 6, price comparisons would not be particularly probative, thus the Commission focussed on product data for more directly competitive products. According to defendant, because M–2 is substantially less electrically efficient, it sells at a discount in comparison to the high permeability products. The court finds that the Commission's decision not to rely upon direct price comparisons between these products is supported by substantial evidence. The Commission's decision here is not inconsistent with its earlier finding that M–2 is substitutable for purposes of a like product analysis. *See R-M Indus.*, 848 F. Supp. at 210 n.9 (finding analysis of substitutability may vary for purposes of like product analysis, as compared with analysis of cumulation and material injury). Obviously, pricing comparisons require a high degree of product substitutability.

b. Additional contentions:

Nippon Steel argues that the Commission failed to account for a great deal of record evidence in its causation analysis. Specifically, Nippon maintains that the Commission ignored evidence that: 1/ there is no domestic production of PDR GOES; 2/ one domestic high-permeability grade producer was very successful during the POI; 3/ domestic producers experienced quality and production problems during the period; 4/ excess domestic capacity was non-existent due to upstream melt capacity reallocated to stainless steel production; and 5/ substitutability for various grades of GOES was limited. Defendant responds that in many cases the Commission did address this evidence directly.

Specifically, the Commission did review evidence of various domestic production problems, *see Final Det.* at I–11 n.60; *Conf. Staff Rpt.* at II–30, II–33–II–34, and customer testimony concerning the relative substitutability between domestic and Japanese products. *See Final Det.* at I–7 & nn.23–24, I–8 n.29; *see also Conf. Staff Rpt.* at II–70. Further, the Commission indicated that domestic high-permeability GOES competes with most, but not all, of Japanese imported high permeability product. *Final Det.* at I–16. This statement certainly includes within it the fact that the domestic industry does not manufacture some high-permeability grades, such as PDR GOES. The Commission also recognized that certain domestic grades were suitable for transformers utilizing high-permeability grade GOES. *Id.* at I–8. As defendant notes, competition between high-permeability products such as PDR GOES and the domestic product existed despite the lack of identicality between these Japanese imports and the domestic products.

As to the evidence concerning profitability of one domestic producer, Nippon has presented only part of the relevant performance data. As

defendant indicates, this producer also experienced consecutive losses in the manufacture of high-permeability products for the first three years of the POI. *See* Def.'s App., Conf. Doc. 17, App. E at E–3 (preliminary investigation staff report). Further, performance indicators also support a finding of nexus to the injury experienced by this producer, including increases in Japanese imports in absolute terms, as well as market share, during the same period in which the producer experienced its largest losses. *See Conf. Staff Rpt.* at II–48, II–51.

Defendant concedes that the Commission did not address expressly the issues of the domestic industry's capacity utilization and declining production levels as a function of diversion to the stainless steel industry. Defendant, however, emphasizes that this issue is only germane to one domestic producer, which indicated that its melt capacity did not restrain its GOES production. Def.'s App., Conf. Doc. 25, at 23, 25. As the evidence concerning capacity is conflicting, the Commission did not err in basing its determination on other substantial grounds. *See Grupo Indus. Camesa,* 853 F. Supp. at 445.

C. *Due process concerns:*

Nippon Steel also raises the argument that by the Commission's acceptance of late submissions of data from domestic producers, the Commission deprived Nippon of various procedural protections. Specifically, Nippon Steel objects to the rejection of its response submissions, and alleges it was not afforded a full opportunity to comment upon each of the producer submissions. Defendant answers that the producer submissions in question were received in a manner consistent with agency regulations, and that such receipt was not prejudicial to Nippon Steel.

The statute requires that in antidumping duty investigations,

> [i]nformation shall be submitted to * * * the Commission during the course of a proceeding on a timely basis and shall be subject to comment by other parties within such reasonable time as * * * the Commission shall provide.

19 U.S.C. § 1677f(e) (1988), *repealed by* 19 U.S.C.A. § 1677f(e) (West Supp. 1995)). The relevant regulation provides that,

> [a]ny party may file a posthearing brief concerning the information adduced at or after the hearing with the Secretary within a time specified * * *. In addition, the presiding official may permit persons to file answers to questions or requests made by the Commission at the hearing within a specified time. The Secretary shall not accept for filing posthearing briefs or answers which do not comply with this rule.

19 C.F.R. § 207.24 (1994).

Four submissions from domestic producers are at issue, dated April 4, April 7, April 28, and May 3, 1994. Each of the submissions was filed at the Commission's request. The first two submissions consisted of a tabulation, by grade, of the volume and value of the various grades of GOES, for each of the domestic producers. Def.-Ints.' App. to Mem. in Opp'n to Pls.' Mots. J. Agency R. at Tab 14. The second two submissions

were, respectively, a document containing revisions to one producer's pricing data, and a document depicting that same producer's profit and cost data by product category (conventional or high- permeability GOES). *Id.* at Tabs 17, 18. The deadline set by the Commission for all questionnaire responses was March 9, 1994, and the deadline for post-hearing briefs was April 20, 1994. Certain data from domestic producers were verified on April 20 through April 22, 1994.[9] Nippon Steel sought to file with the Commission its comments as to all four of the domestic producer submissions, but each set of comments was rejected by the Commission as untimely. *See* Nippon Steel's App. to Mot. J. Agency R., Tabs 29, 32 (letters to Commission dated Apr. 11 and May 4, 1994); Tabs 33, 30 (response letters from Commission dated May 11 and 16, 1994).

Both the April 4 and April 7 submissions were supplied by domestic producers in response to requests made by the Commission consistent with the language of 19 C.F.R. § 207.24. *See* Def.'s Mem. in Opp'n to Pls.' Mots. J. Agency R. at 56. This data was not requested previously in the initial producer questionnaires, thus the domestic producers were not bound by the March 9 filing deadline. Further, the information was submitted prior to the deadline by which Nippon Steel was required to file its post-hearing brief, affording Nippon Steel opportunity for comment. The court notes that Nippon Steel did in fact discuss the data contained in the April 4 and April 7 submissions, both at the hearing and in post-hearing briefs. *See* Def.'s App., Conf. Docs. 35A; 39, at 155; 46, at Ex. 12.

In *General Motors Corp. v. United States,* 827 F. Supp. 774 (Ct. Int'l Trade 1993), this court considered petitioners' due process challenges regarding the lack of opportunity to object to respondents' new data submitted in answer to a Commission request. *Id.* at 782. The Commission had set a deadline for written submissions, but no provision was made for rebuttals. *Id.* The court in *General Motors* noted that "material injury investigations are not adversarial in a formal sense, and it is ultimately ITC's responsibility to evaluate the data it gathers." *Id.* Also, the court acknowledged that it is the Commission's choice to set and enforce time limits for submission of data. *Id.* Thus, in *General Motors,* the court determined that the Commission did not act unreasonably in its acceptance of a data submission one week after the deadline in response to a Commission request, or in its rejection of a rebuttal to that data filed three weeks after the deadline for all submissions. *Id.*

The court finds the facts presented here to be analogous to those presented in *General Motors.* Here, the Commission had set a deadline for receipt of all submissions, and subsequently pursued verification of certain data. The Commission did not establish any procedure for rebuttal concerning data submitted in response to Commission requests, or data revised post-verification. The risk that may arise from acceptance of late

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[9] The data subject to verification related to profit-and-loss, production costs, assets, capital expenditures, research and development, pricing, production, shipments and employment. *See* Nippon Steel's App. to Mot. J. Agency R., Tab 6, at 2; Tab 25, at 2 (verification reports for domestic producer data). As a result of verification, the only data that changed was one domestic producer's production cost data, pricing data and selling, general and administrative expense data. *Id.*, Tab 6, at 2.

data without an opportunity for comment, that is, reliability of the data, is not present in this instance. The Commission verified the data it was to consider, including production data, for which there were no revisions recommended, and Nippon did have some opportunity to comment. The court finds Nippon's arguments regarding the first two submissions to be without merit.

The court similarly does not adopt Nippon's view concerning the second two submissions dated April 28 and May 3, 1994. While each was filed after the deadline for data submissions, each was also provided in response to the Commission's requests. After verification of the specific domestic producer's data on April 20 and 21, 1994, the Commission staff indicated that the pricing data provided in one producer's questionnaire response had been overstated by between 2 and 5 percent and did not reflect customer discounts. *See* Nippon Steel's App. to Mot. for J. Agency R., Tab 6, at 2. Thus the Commission requested that this data be revised, for which the April 28 document was submitted. The profit and cost data contained in the May 3 document, segregating cost data for high permeability and conventional grade GOES, was sought with the intent of using it in the event the Commission found two like product groups. Def.'s Mem. in Opp'n to Pls.' Mots. for J. Agency R. at 59. Ultimately, the Commission did not rely upon this information.

The court does not find that the statute or the applicable regulation guarantees Nippon an opportunity for rebuttal to the April 28 and May 3 submissions. First, the data was not particularly helpful to the domestic industry. Second, the court does not view 19 C.F.R. § 207.24 to be unreasonable, as the agency must set up procedures that will always cut off some comments in order to manage the course of an investigation. It is also clearly within the agency's discretion to establish and enforce time limits upon the submission of data. *Avesta AB v. United States*, 12 CIT 493, 510–11, 689 F. Supp. 1173, 1188 (1988). As discussed earlier, the risk of lack of reliability of the data submitted late without an opportunity for full comment was minimized by the Commission's verification procedures. The Commission's acceptance of the April 28 and May 3 submissions falls within the scope of 19 C.F.R. § 207.24, and is consistent with the holding in *General Motors*, 827 F. Supp. at 782. The court concludes that no due process violations occurred as a result of either the Commission's acceptance of defendant-intervenors' submissions pursuant to the Commission's requests, or the rejection of plaintiffs' comments in response.

CONCLUSION

The Commission's determination regarding grain-oriented electrical steel imports from Italy and Japan is sustained, as it is supported by substantial evidence and is otherwise in accordance with law.

(Slip Op. 95–143)

STELLA M. RUDLOFF, PLAINTIFF *v.* UNITED STATES, ET AL., DEFENDANTS

Court No. 95–01–00002

[Defendants' motion to strike portions of plaintiff's motion for summary judgment granted in part.]

(Dated August 10, 1995)

Law Offices of Michael P. Maxwell (Michael P. Maxwell and *Edith Sanchez Shea)* for plaintiff.

Frank W. Hunger, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Susan Burnett Mansfield), Senoria K. Clarke,* Office of the Chief Counsel, United States Customs Service, of counsel, for defendants.

OPINION

RESTANI, *Judge:* Plaintiff Stella M. Rudloff ("Rudloff") challenges a decision of the Secretary of the Treasury affirming the denial by the United States Customs Service ("Customs") of her request for credit on a response to a question on the April 4, 1994 Customs broker examination. Before the court is defendant's motion to strike certain arguments in and exhibits accompanying plaintiff's motion for summary judgment, on the basis that the arguments and exhibits were not presented to Customs or to the Secretary of the Treasury in the underlying administrative proceedings. For the reasons that follow, defendants' motion is granted in part.

FACTUAL BACKGROUND

On April 4, 1994, Rudloff took the Customs broker examination for the purpose of obtaining a Customs broker license. Rudloff initially received a score of 73, two points below a passing score.[1] She appealed her grade on July 18, 1994, by submitting a written protest to Customs challenging Customs' answers to questions 33 and 34. Specifically, Rudloff asserted that she had correctly answered both questions and consequently should have received credit for them.

Customs notified Rudloff on August 29, 1994, that her appeal as to question 33 had been granted and her grade had been raised to a 74. Customs, however, found Rudloff's answer to question 34 to be incorrect and denied her appeal as to this question, thus effectively denying her a Customs broker license. Rudloff submitted a written appeal to the Secretary of the Treasury on October 26, 1994, protesting Customs' adverse decision. The denial of credit for question 34 was later affirmed by the Secretary of the Treasury on November 22, 1994. Suit in this court subsequently followed.

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[1] A passing score on the Customs broker examination is a 75. 19 C.F.R. § 111.13(e) (1994).

Rudloff has filed a motion for summary judgment asserting that her answer to question 34 is correct and should therefore receive credit for the question. In addition, Rudloff contends that the entire Customs broker examination should be declared invalid because it is unfair. In part, she claims that the Customs broker examination does not test for any "core knowledge"[2] an applicant may have about conducting the Customs business. As a result, Rudloff claims that question 34 should be declared improper and that she be given a passing grade on the Customs examination.[3]

Rudloff also asserts that the administrative appeals process violated her due process rights because she was not able to seek the assistance of counsel in preparing her initial intra-agency appeal.[4] Rudloff maintains that Customs is attempting to minimize the number of applicants who pass the test by preventing attorneys from preparing such appeals. According to Rudloff, this practice is "plainly an unconstitutional attempt to avoid fundamental fairness in the administration of the Customs broker examination."[5] Pl.'s Mem. in Supp. Mot. Summ. J. at 14. As a result of the unfair manner in which Customs administers the test, Rudloff claims that she should be given a passing grade on the April 4, 1994 Customs broker examination.[6]

Defendants in response filed a motion to strike portions of Rudloff's summary judgment motion. Pursuant to USCIT Rule 12(f), a motion to strike may be granted when a party's pleading contains an insufficient defense, or any redundant, immaterial, impertinent, or scandalous matter. Defendants seek to exclude from the record Rudloff's argument concerning the validity of the exam, and her due process argument, as well as accompanying Exhibits B through H,[7] because they were not presented to Customs or to the Secretary of the Treasury at the administrative appeals level.

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[2] Rudloff has not made clear what exactly "core knowledge" consists of.

[3] Rudloff asserts that there is a lack of consistency in the passage rate for the Customs broker examination indicating that the test is unfair. For instance, the 2% passage rate in 1988 as compared to the 40% passage rate for the October 1994 Customs examination, demonstrates, according to Rudloff, the absence of any core standards by which the test is administered. Pl.'s Mem. in Supp. Mot. Summ. J. at 13.

[4] The protest policy and procedures accompanying the April 4, 1994 examination provided, in pertinent part, as follows:

> 1. Any applicant who wishes to protest the Customs scoring of any question on this examination must submit his or her own written arguments for alternative answers to Customs Headquarters *within 60 days of the date of the written Customs notification of the examination results.*
> 2. Applicants must submit *their own protests;* protests prepared by third parties will not be accepted.

Pl.'s Mem. in Supp. Mot. Summ. J., Ex. A at 3.

[5] Rudloff claims that the lack of fairness is further demonstrated by the fact that Customs does not award all applicants credit when a question is found to be flawed, but only awards credit to those individuals who have protested the specific question. Pl.'s Mem. in Supp. Mot. Summ. J. at 14. Plaintiff argues that Customs should be required to give credit to all applicants when an incorrect question has been asked, regardless whether or not protests have been submitted.

[6] Rudloff has abandoned the argument that she is to automatically receive credit for question 34 if the court finds that Customs procedures are somehow legally deficient. She now asserts that the court must review Customs procedures in its administration of the exam in order to bring them into conformity with the law. Pl.'s Resp. to Defs.' Mot. to Strike at 10.

[7] The exhibits include: affidavits from Customs broker course instructors attesting to the unfairness of the exam, prior Customs rulings concerning classification of pool thermometers, and an article and correspondence concerning the formulation of the exam. *See* Pl.'s Mem. in Supp. Mot. Summ. J. at Exs. B-H.

DISCUSSION

In license denial cases, an applicant has a statutory right, pursuant to 19 U.S.C. § 1641(e)(4) (1988),[8] to present additional evidence to the court. The party wishing to enter the additional evidence, however, is required to seek leave from the court to present the evidence to the agency, which may modify its finding on the basis of the evidence. *Id.* In order for the additional evidence to be admitted, however, the court must find that it is material and that reasonable grounds existed for failure to present the evidence at the administrative level. *Id.* Failure to satisfy the above statutory requirements limits the record before the court to the record made before the administrative agency. *Bell v. United States*, 839 F. Supp. 874, 878 (Ct. Int'l Trade 1993).

Upon examination of the record, the court finds that Rudloff has introduced additional arguments and evidence in her motion for summary judgment that were not introduced at the administrative appeals level. Although in her response to defendants' motion to strike and stay, Rudloff contends that she clearly raised arguments relating to the unfairness and impropriety of the Customs broker examination as a whole at the administrative appeals level, the court finds otherwise. Pl.'s Resp. to Defs.' Mot. to Strike at 3, 4. In her protests to Customs, Rudloff specifically challenged the fairness of questions 33 and 34, not the fairness of the entire examination, as she contends. For instance, in her protest to question 33 Rudloff stated "[t]his question is grossly unfair. [T]he Question is unclear and vague in the analysis and presentation of the material * * *. In Conclusion, I would like to say that this question is vague, unclear and unfair * * *." *Id.*, Ex. A, at 1–2. In her protest to question 34, Rudloff also requested that Customs "consider throwing this question out, not because it might be wrong, but because it was simply not a fair question. * * * This is a bad question on which there is a great deal of dispute." *Id.* at 4.

In instances dealing with the admission of new evidence, the court has discretion as to whether or not to admit the evidence. The exercise of such judicial discretion depends upon the applicant *first meeting* the threshold requirement set forth in 19 U.S.C. § 1641(e)(4), that is, to first petition the court for the admittance of any additional evidence. *See supra* note 8. Rudloff has failed to make a motion to leave to present additional evidence. As a result of Rudloff's failure to meet this requirement, defendants' motion to strike her additional arguments contesting

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[8] The statute provides as follows:

> If any party applies to the court for leave to present additional evidence and the court is satisfied that the additional evidence is material and that reasonable grounds existed for the failure to present the evidence in the proceedings before the hearing officer, the court may order the additional evidence to be taken before the hearing officer and to be presented in a manner and upon the terms and conditions prescribed by the court. The Secretary [of the Treasury] may modify the findings of facts on the basis of the additional evidence presented. The Secretary shall then file with the court any new or modified findings of fact which shall be conclusive if supported by substantial evidence, together with a recommendation, if any, for the modification or setting aside of the original decision or order.

19 U.S.C. § 1641(e)(4).

the general validity of the Customs broker examination, based on such additional evidence, is granted.[9] In addition, factual Exhibits B, C, F-H are stricken.[10]

Furthermore, the court denies Rudloff's claim of lack of due process for failure to make this argument to the agency and on the merits. *See* 28 U.S.C. § 2637(d) (1988) ("[T]he [CIT] shall, where appropriate, require the exhaustion of administrative remedies."). Under the Administrative Procedure Act ("APA"),[11] where an agency adjudicates an application for an initial license, an applicant must be accorded appropriate process. Whether an applicant will be afforded a full adjudicative hearing will depend upon the particular governing statute. For instance, 19 U.S.C. § 1641(d)(2)(B) (1988) does not provide for any formal administrative hearings in license denial cases, in contrast to revocation or suspension cases. *See also Pietrofeso v. United States,* 16 CIT 751, 755, 801 F. Supp. 743, 747 (1992) (discussing due process rights in Customs broker licensing proceedings).

In this case, Customs provided Rudloff with a forum, pursuant to 19 C.F.R. § 111.17 (1994),[12] in which she was able to (1) present information and arguments in support of her application, (2) receive additional review of her application from the Secretary of the Treasury, at which point she was allowed the assistance of counsel, and (3) receive a determination as to her eligibility solely based upon the evidence presented and received as part of the record. In sum, the steps defendants took in addressing Rudloff's appeal provided a degree of procedural protection that was adequate to satisfy any due process concerns.

As plaintiff's additional arguments and factual exhibits are stricken or otherwise disposed of, the remainder of Rudloff's summary judgment motion is hereby designated a motion for judgment upon the agency record, as requested by defendant.

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[9] Furthermore, plaintiff has not alleged reasonable grounds for failure to present the evidence at the administrative appeals level. For this reason, the court need not reach the issues of whether the additional evidence is admissible.

[10] Customs' rulings, such as Exhibits D and E, are law and to the extent they are relevant to question 34 they may be cited and will be considered by the court.

[11] The APA, under 5 U.S.C. § 558(c), provides in part:

> When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision.

5 U.S.C. § 558(c) (1988).

[12] The regulation provides for review of the denial of a license as follows:

> (a) *By the Commissioner.* Upon the denial of an application for a license, the applicant may file with the Commissioner of Customs, in writing, a request that further opportunity be given for the presentation of information or arguments in support of the application by personal appearance, or in writing, or both. This request must be received by the Commissioner within 60 days of the denial.
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> (b) *By the Secretary.* Upon the decision of the Commissioner affirming the denial of an application for a license, the applicant may file with the Secretary of the Treasury, in writing, a request for such additional review as the Secretary shall deem appropriate. This request must be received by the Secretary within 60 days of the Commissioner's affirmation of the denial of an application for a license.
>
> (c) *By the Court of International Trade.* Upon a decision of the Secretary of the Treasury affirming the denial of an application for a license, the applicant may appeal the decision to the Court of International Trade provided the appeal action is commenced within 60 days after the date of entry of the Secretary's decision.

19 C.F.R. § 111.17.

CONCLUSION

Defendants' motion to strike or deny plaintiff's additional arguments concerning the fairness of the examination as a whole and due process is granted. Defendants' motion to strike Exhibits B, C, F-H is also granted. Finally, plaintiff's summary judgment motion is designated a motion for judgment upon the agency record.

(Slip Op. 95–144)

LACLEDE STEEL CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND HYUNDAI PIPE CO., LTD., ET AL., DEFENDANT-INTERVENORS

Consolidated Court No. 92–12–00784

[Results of remand to the U.S. Department of Commerce, International Trade Administration, are sustained. Action dismissed.]

(Dated August 11, 1995)

Schagrin Associates (R. Alan Luberda, John C. Steinberger) for plaintiff.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Cynthia B. Schultz);* Office of the Chief Counsel for Import Administration, United States Department of Commerce *(Lucius B. Lau),* of counsel, for defendant.

Morrison & Foerster (Donald B. Cameron, Craig A. Lewis, Panagiotis C. Bayz), for defendant-intervenors.

MEMORANDUM AND OPINION

GOLDBERG, *Judge:* This matter is before the court following remand to the U.S. Department of Commerce, International Trade Administration ("Commerce"). *Laclede Steel Co. v. United States,* 18 CIT ____, Slip Op. 94–160 (Oct. 12, 1994). The reasoning and conclusions of the aforementioned slip opinion are incorporated herein by reference. In remanding this action, the court directed Commerce to review home market sales of overrun production of the subject merchandise (i.e. circular welded non-alloy steel pipe from the Republic of Korea) to determine whether they were made in the ordinary course of trade, taking into account all of the relevant facts and circumstances particular to the sales in question. *Laclede Steel,* Slip Op. 94–160 at 28. The court also directed Commerce to grant adjustments for duty drawback on all U.S. sales, including those compared to constructed value, and to conduct a correlation test to determine whether there is a correlation between price and level of trade for the subject merchandise. *Id.* at 29.

Commerce filed its remand results on March 3, 1995. To correct certain typographical errors in the "Summary" section, Commerce filed amended results on March 9, 1995. Upon remand, Commerce determined that for both Hyundai Pipe Co., Ltd. ("Hyundai") and Pusan

Steel Pipe Co., Ltd. ("Pusan") (collectively "respondents"), sales of overrun pipe were made outside the ordinary course of trade and are thus appropriately excluded for purposes of calculating foreign market value ("FMV"). Second, in accordance with the court's instructions, Commerce granted adjustments for duty drawback on all U.S. sales, including those compared to constructed value. Finally, because the results of the correlation test were inconclusive, Commerce determined that FMV should be calculated without regard to level of trade.

Plaintiff, Laclede Steel Co. ("Laclede"), presently challenges the first aspect of Commerce's remand determination; namely, Commerce's conclusion that sales of overrun pipe in the home market are outside the ordinary course of trade. Laclede raises three main arguments in support of its position. The court exercises its jurisdiction pursuant to 28 U.S.C. § 1581(c) (1988).

Discussion

In reviewing the results of Commerce's redetermination pursuant to court remand, the court must determine whether any determination, finding, or conclusion is unsupported by substantial evidence on the record, or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B) (1988). "Substantial evidence is something more than a 'mere scintilla,' and must be enough reasonably to support a conclusion." *Ceramica Regiomontana, S.A. v. United States,* 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986) (citations omitted), *aff'd,* 5 Fed. Cir. (T) 77, 810 F.2d 1137 (1987). The possibility of drawing two inconsistent conclusions from evidence on the record does not prevent an administrative agency's finding from being supported by substantial evidence. *Matsushita Elec. Indus. Co. v. United States,* 3 Fed. Cir. (T) 44, 51, 750 F.2d 927, 933 (1984) (citing *Consolo v. Federal Maritime Comm'n,* 383 U.S. 607, 619–20 (1966)).

Initially, the court notes that no party disputes the latter two aspects of Commerce's remand determination, i.e. the granting of adjustments for duty drawback on all U.S. sales and the results of Commerce's correlation test for levels of trade. The court has reviewed these results, and finds them each to be supported by substantial evidence on the record and in accordance with law. Accordingly, these aspects of Commerce's remand determination are sustained.

With regard to Commerce's analysis of respondents' overrun sales, Laclede argues first that Commerce erred by relying upon information not properly on the record in reaching its remand determination. Specifically, Laclede contends that Commerce's decision to expand the administrative record by soliciting additional information from Hyundai and Pusan was an abuse of discretion, and contravened the plain language of the court's instructions in remanding this matter. The court disagrees.

Commerce was originally afforded sixty days within which to issue its remand determination, i.e. until December 12, 1994. *Laclede Steel,* Slip Op. 94–160 at 30. On November 29, 1994, however, Commerce filed a consent motion requesting an additional forty-five days within which to

file its remand determination. Defendant's consent motion for an extension of time specifically identified as one of the grounds justifying such an extension the fact that Commerce might require more time "to obtain additional verifiable information from the respondents." *Defendant's Consent Motion For Extension of Time to File Remand Results* at 2 (Nov. 29, 1994). The court notes that Laclede expressly consented to this motion, thus acquiescing to possible expansion of the administrative record in this case. *Id.*

The court granted defendant's consent motion by order dated December 8, 1995; in so doing, the court implicitly acknowledged that any decision on the part of Commerce to collect additional information would be in conformance with the court's order of remand. As the court stated in its initial review of this issue, Commerce's "failure to adequately address: the number of home market customers buying alleged overruns; the product standards and uses of alleged overruns; and, the prices and profits on alleged overrun sales, necessitates a remand for reconsideration of these factors." *Laclede Steel,* Slip Op. 94–160 at 8. The court therefore directed Commerce to fully analyze respondents' overrun sales by "taking into account *all* of the relevant facts and circumstances particular to the sales in question." *Id.* at 28 (emphasis added). This language clearly evinces the court's intent that Commerce undertake any effort necessary to conduct a comprehensive analysis of the sales at issue.

Commerce, in its discretion, chooses how best to analyze the many factors involved in a determination of whether sales are made within the ordinary course of trade. Any decision to expand the administrative record upon remand is well within that discretion, absent express language from the court barring such action. Indeed, as prior caselaw makes clear, if nothing in the order of remand precludes the agency from requesting additional information which it deems necessary to comply with the court's instructions, the agency is free to solicit such information. *See, e.g., Win-Tex Prods., Inc. v. United States,* 18 CIT ____, ____, 843 F. Supp. 709, 712 (1994). In this case, nothing in the court's memorandum opinion and order barred Commerce from expanding the administrative record on remand. Accordingly, the court finds that Commerce did not abuse its discretion in soliciting additional information from Hyundai and Pusan. For the foregoing reasons, Commerce's decision to expand the administrative record upon remand is sustained.

Second, Laclede argues that it suffered prejudice due to procedural unfairness during the course of the remand proceedings. Specifically, Laclede alleges that it was "denied the normal opportunity to comment on the information requests and to suggest appropriate areas of inquiry," and that this deprived Laclede of an opportunity to "participate meaningfully in the 'enhancement' of the record." *Plaintiff's Objection To Department of Commerce's Remand Results ("Plaintiff's Brief")* at 5–6. Laclede also argues that its due process rights were violated because Commerce allegedly permitted respondents to "reargue

completely their entire case concerning overruns," instead of "limit[ing] them to responding to the specific questions posed." *Id.* at 6. Upon review, the court finds Laclede's allegations entirely without merit.

As noted, by consenting to defendant's motion for an extension of time, Laclede was put on notice of the possibility that Commerce would seek additional information from respondents. Although Laclede was not afforded an opportunity to comment upon Commerce's information requests prior to their issuance,[1] Laclede did request that Commerce seek a second extension of time from this court so that Commerce could verify the responses provided by the Korean producers. Commerce complied with this request, and the court granted defendant's motion by order dated February 1, 1995. Laclede then submitted specific comments for Commerce to consider in performing its verification. *Confid. Rem. Doc. 10,* at 2. Following verification, Laclede also submitted written comments on Commerce's draft remand results. *Confid. Rem. Doc. 17.* The record thus belies Laclede's claim that it was deprived of meaningful participation in the remand proceedings; to the contrary, it is evident that Laclede was an integral participant. Based upon the foregoing, the court finds that Laclede did not suffer any prejudice due to alleged procedural unfairness on the part of Commerce during remand.

The court also finds that Commerce did not abuse its discretion in accepting the responses of Hyundai and Pusan in their entirety. Commerce's questionnaire dated December 27, 1994 requested Hyundai and Pusan to supply "appropriate documentation and narrative explanations" concerning the end-uses of overrun pipe. *Public Remand Document 1,* at 1 *("Pub. Rem. Doc.").* Similarly, Commerce's January 4, 1995 questionnaire requested a "detailed discussion of the end-uses associated with non-overrun pipe." *Pub. Rem. Doc. 2,* at 1. It is thus apparent that Commerce sought a full discussion of the issues surrounding respondents' overrun sales. Moreover, Commerce allowed all parties an equal opportunity to present fully their legal arguments, in order to ensure that its remand results addressed all relevant facts and circumstances in a comprehensive manner. In particular, Commerce accepted not only Hyundai's and Pusan's exhaustive submission to its questionnaire, but also accepted Laclede's exhaustive seventy-six page response. *See Confid. Rem. Doc. 5.* Based upon the foregoing, the court finds that Commerce's decision to accept the responses of Hyundai and Pusan in their entirety did not violate Laclede's due process rights.

Finally, Laclede argues that Commerce's remand determination concerning respondents' overrun sales is not based upon substantial evidence on the record. The court disagrees. To the contrary, upon reviewing the entirety of the record the court finds that Commerce's remand determination enjoys substantial evidentiary support; indeed,

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[1] Hyundai and Pusan filed responses on January 11, 1995; January 13, 1995; and January 18, 1995. *See Confidential Remand Document 5,* at 1 *("Confid. Rem. Doc.").* Laclede submitted written comments on January 13, 1995, and January 25, 1995. *Confid. Rem. doc. 5,* at 1–2.

Commerce is to be commended for the thoroughness of its investigation on remand. In support of its determination, Commerce made the following findings:

> (1) Overrun pipe is sold at lower prices than commercial pipe; (2) Overrun pipe is unprofitable compared to commercial pipe; (3) Overrun pipe is purchased by only a small number of customers; (4) Assurances are not provided that overrun pipe meets industry specifications (unlike sales of commercial pipe); (5) Overrun pipe is sold by weight; commercial pipe is sold by grade, specification, and length;[2] (6) The end uses for overrun pipe differ from normal pipe sales. They include such applications as construction of rear carts or push carts for transporting food or construction materials, animal fences, steel pipe doors, and poles and spikes on construction sites, etc. By contrast, the commercial assurances provided by both companies allow commercial pipe end users to use this pipe in plumbing and other higher end-use applications requiring specific product specifications; (7) The average overrun pipe sale is, by quantity, smaller than are sales of commercial pipe; (8) Overrun pipe sales constitute a small percentage of all home market sales; and (9) Overrun pipe is marked differently than commercial pipe to distinguish the two types of pipe.

Remand Results of Redetermination Pursuant To Court Remand at 15 (Mar. 3, 1995) *("Remand Results")*. These findings are clearly supported by substantial record evidence. In particular, the record reflects that: the weighted-average profit levels for respondents' sales of overrun pipe were significantly lower than for commercial pipe sales *(Remand Results* at 5); for both Hyundai and Pusan, the number of overrun pipe customers was minuscule in comparison to the number of commercial pipe customers *(Remand Results* at 6); the average sale quantity for overrun pipe sales is much smaller than the average sale quantity for commercial pipe sales *(see Remand Results* at 8); overrun pipe sales constitute only a small percentage of all home market sales *(see Remand Results* at 9); the absence of commercial assurances for end users of overrun pipe concerning product quality limit the end-uses of overrun pipe to low-level applications *(Remand Results* at 13–14); and, although both overrun pipe and commercial pipe are marked with the specification of the pipe, overrun pipe also bears additional markings that distinguish it from commercial pipe *(Remand Results* at 13). In sum, the court is convinced that Commerce has fully analyzed the totality of circumstances surrounding the sales in question, and has rendered a determination supported by substantial evidence on the record.

The crux of Laclede's argument is that Commerce ignored certain evidence in making its remand determination. Laclede contends that this evidence establishes that respondents' sales of overrun pipe were made in the ordinary course of trade. The court, however, is convinced that

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[2] Commerce noted that respondents' method of selling pipe, i.e. by length for commercial pipe and by weight for overrun pipe, is not, in and of itself, significant; nevertheless, Commerce recognized that it does represent one of several differences in the conduct of trade in overrun pipe versus trade in commercial pipe. *Remand Results* at 7.

Commerce considered all relevant facts and circumstances in rendering its determination. Furthermore, as noted, the possibility of drawing two inconsistent conclusions from evidence on the record does not prevent an administrative agency's finding from being supported by substantial evidence. *Matsushita,* 3 Fed. Cir. (T) at 51, 750 F.2d at 933 (citation omitted). In this case, the court finds that the evidence cited by Laclede does not so detract from the evidence relied upon by Commerce that the remand determination is rendered unsupported by substantial evidence on the record. *Cf. Matsushita,* 3 Fed. Cir. at 54, 750 F.2d at 936 (it is not the court's function to decide that it would have made another decision on the basis of the evidence). For all the foregoing reasons, the court sustains Commerce's determination that respondents' sales of overrun pipe in the home market were made outside the ordinary course of trade.

CONCLUSION

The court has reviewed all three aspects of Commerce's remand determination and finds them each supported by substantial evidence on the record and in accordance with law. Consequently, in conjunction with the court's memorandum opinion and order of remand, see *Laclede Steel Co. v. United States,* 18 CIT ___, Slip Op. 94–160 (Oct. 12, 1994), all issues raised by the parties to this consolidated action have been resolved. The results of Commerce's redetermination pursuant to court remand are sustained in their entirety. Judgment will be entered accordingly.

(Slip Op. 95–145)

HUSSEY COPPER, LTD., THE MILLER CO., OUTOKUMPU AMERICAN BRASS, REVERE COPPER PRODUCTS, INC., INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA (AFL-CIO), MECHANICS EDUCATIONAL SOCIETY OF AMERICA (LOCAL 56), AND UNITED STEEL WORKERS OF AMERICA (AFL-CIO/CLC), PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND WIELAND-WERKE AG, LANGENBERG KUPFER UND MESSINGWERKE GMBH, METALLWERKE SCHWARZWALD GMBH, WIELAND-AMERICA, INC., AND WIELAND METALS, DEFENDANT-INTERVENORS

Consolidated Court No. 91–12–00919

[Commerce's remand results are remanded.]

(Decided August 11, 1995)

Collier, Shannon, Rill & Scott (David A. Hartquist, Jeffrey S. Beckington, and *David C. Smith, Jr.)* for plaintiffs.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Patricia L. Petty), David Richardson,* Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Arnold & Porter (Richard A. Johnson and *Susan G. Lee)* for defendant-intervenor.

OPINION AND ORDER

DICARLO, *Chief Judge:* Plaintiffs in this consolidated action, Hussey Copper, Ltd., The Miller Co., Outokumpu American Brass, Revere Copper Products, Inc., International Association of Machinists and Aerospace Workers, International Union, Allied Industrial Workers of America (AFL-CIO), Mechanics Educational Society of America (Local 56), and United Steel Workers of America (AFL-CIO/CLC) (collectively Hussey), contest the redetermination filed pursuant to this court's remand order in *Hussey Copper, Ltd. v. United States,* 18 CIT ____, 852 F. Supp. 1116 (1994) *(Hussey II),* and seek further remand. Defendant-Intervenors, Wieland-Werke AG, Langenberg Kupfer und Messingwerke GmbH, Metallwerke Schwarzwald GmbH, Wieland-America, Inc., and Wieland Metals (collectively Wieland) concur, and seek affirmance of the remand results. The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2) (1988) and 28 U.S.C. § 1581(c) (1988).

BACKGROUND

This action stems from the United States Department of Commerce's first administrative review of its antidumping duty order for brass sheet and strip from the Federal Republic of Germany. *Brass Sheet and Strip From the Federal Republic of Germany,* 56 Fed. Reg. 60,087 (Dep't Comm. 1991) (final admin. review), *amended by* 57 Fed. Reg. 276 (Dep't Comm. 1992). The first round of challenges to this determination was addressed by this court in *Hussey Copper, Ltd. v. United States,* 17 CIT 993, 834 F. Supp 413 (1993) *(Hussey I).* Both Hussey and Wieland renewed their challenges after issuance of the first remand determination. This court once again remanded the action instructing, in part: "Commerce shall conduct the product matching by using the exact alloy model matching method; Commerce may request additional information from Wieland to the extent that such information is necessary to conduct the product matching on the exact alloy matching basis." *Hussey II,* 18 CIT at ____, 852 F. Supp. at 1122.

Hussey asserts Commerce circumvented this instruction by failing to use exact alloy product matches when comparing Wieland's United States and home market sales. Specifically, Hussey alleges Commerce: (1) failed to match United States sales with similar home market sales by selecting the physically most similar home product; (2) improperly compared home market sales of products containing multiple alloys to United States sales of specific alloy products; and (3) failed to match United States sales with contemporaneous home market sales containing the same alloy.

Commerce agrees its methodology is flawed with respect to the second and third allegations, and requests a remand to allow it to make corrections. Commerce also admits it selected the home market product with the smallest difference in merchandise production cost. Commerce claims, however, this is an appropriate method to match United States sales with the most similar home market sales.

DISCUSSION

This court must uphold Commerce's final determination in an administrative review unless that determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

1. *Differences in Merchandise Adjustment:*

When calculating an antidumping duty, Commerce must compare the price of the foreign product sold in the United States with the price of "such or similar merchandise" sold in the exporter's home market. *See* 19 U.S.C. §§ 1673(b)(1)(A), 1677b(a)(1) (1988). To ensure the accuracy of the antidumping investigation, the products compared must be as similar as possible. *SKF USA Inc. v. United States*, 19 CIT ___, ___, 876 F. Supp. 275, 279 (1995). This "apples-to-apples" comparison will also ensure the fairness of the determination. *Smith-Corona Group v. United States*, 1 Fed. Cir. (T) 130, 140, 713 F.2d 1568, 1578 (1983), *cert. denied*, 465 U.S. 1022 (1984).

Accordingly, Commerce must first look for "such" merchandise, which is a home market product physically *identical* to the merchandise sold in the United States. Only if "such" merchandise is unavailable may Commerce use a physically "similar" product. 19 U.S.C. § 1677(16) (1988). Once a product sold in the United States is matched with a similar home market product, Commerce must adjust for physical differences between the products if satisfied that any price differential is wholly or partly the result of such physical differences. 19 U.S.C. § 1677b(a)(4) (1988); 19 C.F.R. § 353.57 (1995). When making this adjustment for similar merchandise, Commerce "normally will consider differences in the cost of production." 19 C.F.R. § 353.57(b) (1995).

Hussey alleges Commerce's method of matching United States sales with home market sales is contrary to law, because it is not based upon "the closest identity of physical characteristics." (Pl.'s Br. at 9.) Instead, Hussey asserts, Commerce accepted Wieland's methodology of matching home market sales based upon the smallest difference in production cost (difmer). *Id.*

Commerce acknowledges it used the smallest production cost difference, matching home market sales by identifying the home market merchandise having the closest copper cost to the United States product. *Final Results of Redetermination Pursuant to Court Remand*, May 16, 1994, at 6. According to Commerce, however,

> [t]he largest component of the alloy in cost and content, by far, is copper. Matching sales to the most similar merchandise based upon the smallest alloy difmer essentially matches the U.S. sale with the home market sale containing the alloy with the closest copper content. Moreover, when resorting to a most similar product match,

> the other four physical characteristics of the product are also taken into account, *i.e.*, the form, coating, gauge, and width of the merchandise.

(Def.'s Br. at 6–7.)

Section 1677b(a)(4) directs Commerce to adjust for physical differences, "if it is established * * * that the amount of any difference between the United States price and the foreign market value * * * is wholly or partly due to * * * the fact that [most similar merchandise] is used in determining foreign market value." 19 U.S.C. 1677b(a)(4). Thus, the differences in merchandise adjustment based on production costs is applied *after* the "similar" merchandise has been selected. *See id.* Commerce, however, reverses this procedure. Instead of selecting the most similar home market product and then applying the difference in production cost as an adjustment, Commerce used the difference in production cost to determine the most similar home market merchandise. This approach is contrary to the statute's mandate, *id.*, and does not, in all instances, provide the same matches that result under the approach required by statute, *(see* Pls' Conf. Reply Br. at 3–4)

Furthermore, although the court recognizes that Commerce also considers the four remaining physical characteristics in selecting such or similar merchandise, these characteristics serve only as additional categories of comparison. They are not a safeguard against errors in Commerce's methodology.

Commerce is afforded broad discretion to interpret the standards established by the antidumping statutes. *Smith-Corona Group,* 1 Fed. Cir. (T) at 132, 713 F.2d at 1571. However, Commerce "cannot, under the mantle of discretion, violate these standards or interpret them out of existence." *Id.* The court cannot understate the importance of product comparison in an antidumping investigation; the matching of United States and home market sales lies at the heart of Commerce's determination. *Timken Co. v. United States,* 10 CIT 86, 95, 630 F. Supp. 1327, 1336 (1986). Thus, any substantial deviation from the approach mandated by statute is impermissible.

The court finds Commerce's methodology for selection of matches based on smallest differences in copper cost is not in accordance with law, and remands this issue so that Commerce can select the most similar home market merchandise based on the closest identity of physical characteristics.

2. *Best Information Available:*

Hussey further asserts that, given Wieland's previous opportunities to comply with Commerce's data requests, the court should now require Commerce to use adverse information based on the best information available (BIA). 19 U.S.C. § 1677e(c) (1988). The court disagrees. Commerce is instructed to resort to BIA if a party is uncooperative or is unable to respond in a timely manner. *Id.* In this case, however, issues are being remanded primarily to correct errors in Commerce's methodology. As the basic purpose of this statute is to ensure accurate dumping

margins, *Rhone Poulenc, Inc. v. United States*, 8 Fed. Cir. (T) 61, 68, 899 F.2d 1185, 1191 (1990), Commerce may request additional information from Wieland.

CONCLUSION

In accordance with the foregoing opinion, this case is remanded to Commerce with the following instructions:

(1) Commerce shall determine the most similar home market merchandise based upon the closest identity of physical characteristics. Any adjustments, including differences in production costs, shall be made after Commerce has selected the most similar home market products. If necessary, Commerce shall obtain further information from Wieland.

(2) Commerce shall match specific alloy United States sales with specific alloy home market sales. If necessary, Commerce shall obtain corrected product matching keys from Wieland.

(3) Commerce shall match United States sales with contemporaneous home market sales involving the same alloy. Commerce shall correct any coding errors and, if necessary, obtain further information from Wieland.

Commerce shall file its remand results with the court within 90 days of this opinion. Any party contesting the remand results shall file comments with the court within 30 days of the filing of the remand results. Responses to those comments must be filed within 15 days after the filing of the comments.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C95/63 8/7/95 Musgrave, J.	ICS Integrated Computer Systems, Ltd.	92-03-00144	8471.91.00 3.9%	9801.00.10 Free of duty	Agreed statement of facts	Buffalo Automated data processing machine

Index

Customs Bulletin and Decisions
Vol. 29, No. 35, August 30, 1995

U.S. Customs Service

Treasury Decisions

General Notices

CUSTOMS RULINGS LETTERS

U.S. Court of International Trade

Slip Opinions

Abstracted Decisions

U.S. G.P.O. 1995–387–567–00053